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Christopher G. Tiedeman, ***A Treatise on State and Federal Control of Persons and Property in the United States considered from both a Civil and Criminal Standpoint*** [1900]

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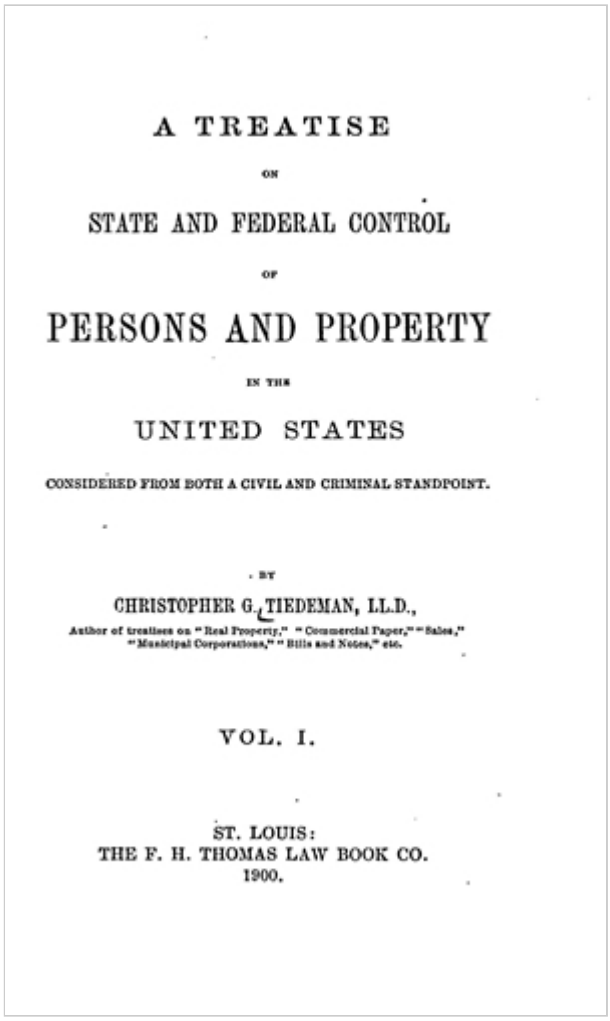

A TREATISE

ON

STATE AND FEDERAL CONTROL

OF

PERSONS AND PROPERTY

IN THE

UNITED STATES

CONSIDERED FROM BOTH A CIVIL AND CRIMINAL STANDPOINT.

BY

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VOL. I.

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Author: Christopher G. Tiedeman

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A 2 volume work which examines the power of the government over individual personal and property rights under the US constitution. Vol. 1 deals with criminals, morality, speech, and occupations. Vol. 2 with land, husbands and wives, children, and police.

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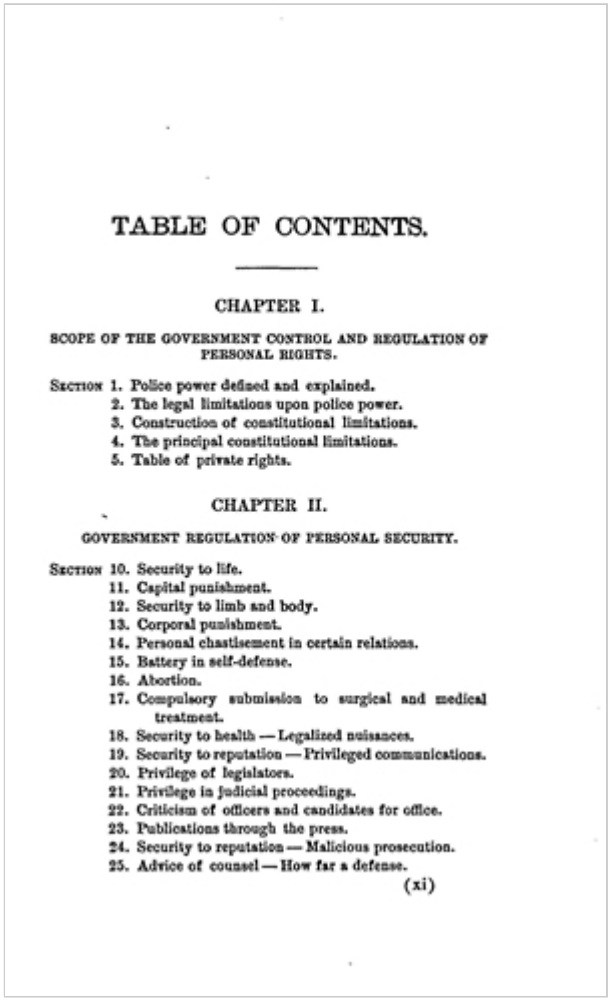

TABLE OF CONTENTS.

CHAPTER I.

SCOPE OF THE GOVERNMENT CONTROL AND REGULATION OF PERSONAL RIGHTS.

CHAPTER II.

GOVERNMENT REGULATION OF PERSONAL SECURITY.

(xi)

Table Of Contents

St. Louis, Mo.:

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these pages are affectionately inscribed to my wife, HELEN SEYMOUR TIEDEMAN, whose scrupulous regard for the rights of others, and tender sympathy for their weaknesses, have been my guide and inspiration.

[Back to Table of Contents]

PREFACE.

In the days when popular government was unknown, and the maxim *Quod principi placuit, legis habet vigorem,* seemed to be the fundamental theory of all law, it would have been idle to speak of limitations upon the police power of government; for there were none, except those which are imposed by the finite character of all things natural. Absolutism existed in its most repulsive form. The king ruled by divine right, and obtaining his authority from above he acknowledged no natural rights in the individual. If it was his pleasure to give to his people a wide room for individual activity, the subject had no occasion for complaint. But he could not raise any effective opposition to the pleasure of the ruler, if he should see fit to impose numerous restrictions, all tending to oppress the weaker for the benefit of the stronger.

But the divine right of kings began to be questioned, and its hold on the public mind was gradually weakened, until, finally, it was repudiated altogether, and the opposite principle substituted, that all governmental power is derived from the people; and instead of the king being the vicegerent of God, and the people subjects of the king, the king and other officers of the government were the servants of the people, and the people became the real sovereign through the officials. *Vox populi, vox Dei,* became the popular answer to all complaints of the individual against the encroachments of popular government upon his rights and his liberty. Since the memories of the oppressions of the privileged classes under the reign of kings and nobles were still fresh in the minds of individuals for many years after popular government was established in the English-speaking world, content with the enjoyment of their own liberties, there was no marked disposition manifested by the majority to interfere with the like liberties of the minority. On the contrary the sphere of governmental activity was confined within the smallest limits by the popularization of the so-called *laissez-faire* doctrine, which denies to government the power to do more than to provide for the public order and personal security by the prevention and punishment of crimes and trespasses. Under the influence of this doctrine, the encroachments of government upon the rights and liberties of the individual have for the past century been comparatively few. But the political pendulum is again swinging in the opposite direction, and the doctrine of governmental inactivity in economical matters is attacked daily with increasing vehemence. Governmental interference is proclaimed and demanded everywhere as a sufficient panacea for every social evil which threaten the prosperity of society. Socialism, Communism, and Anarchism are rampant throughout the civilized world. The State is called on to protect the weak against the shrewdness of the stronger, to determine what wages a workman shall receive for his labor, and how many hours daily he shall labor. Many trades and occupations are being prohibited because some are damaged incidentally by their prosecution, and many ordinary pursuits are made government monopolies. The demands of the Socialists and Communists vary in degree and in detail, and the most extreme of them insist upon the assumption by government of the paternal character altogether, abolishing all private property in land, and making the State the sole possessor of the working capital of the nation.

Contemplating these extraordinary demands of the great army of discontents, and their apparent power, with the growth and development of universal suffrage, to enforce their views of civil polity upon the civilized world, the conservative classes stand in constant fear of the advent of an absolutism more tyrannical and more unreasoning than any before experienced by man, the absolutism of a democratic majority.

The principal object of the present work is to demonstrate, by a detailed discussion of the constitutional limitations upon the police power in the United States, that under the written constitutions, Federal and State, democratic absolutism is impossible in this country, as long as the popular reverence for the constitutions, in their restrictions upon governmental activity, is nourished and sustained by a prompt avoidance by the courts of any violations of their provisions, in word or in spirit. The substantial rights of the minority are shown to be free from all lawful control or interference by the majority, except so far as such control or interference may be necessary to prevent injury to others in the enjoyment of their rights. The police power of the government is shown to be confined to the detailed enforcement of the legal maxim, *sic utere tuo, ut alienum non lædas.*

If the author succeeds in any measure in his attempt to awaken the public mind to a full appreciation of the power of constitutional limitations to protect private rights against the radical experimentations of social reformers, he will feel that he has been amply requited for his labors in the cause of social order and personal liberty.

C. G. T.

University of the State of Missouri, Columbia, Mo.,

November 1, 1886.

[Back to Table of Contents]

PREFACE TO THE SECOND EDITION.

When, fourteen years ago, this book was first published, under the title of "Limitations of Police Power," the author's most exhaustive search of all branches of the law produced only enough material to make a book of one volume. The retrospect of the subject to-day,—in the light of the marvelous development, in the intervening years, of economic and industrial combinations, and of the demands of public opinion that the government, in the exercise of its police power, shall restrain and subject to far-reaching regulations, not only every such combination of labor or of capital, but the enjoyment of almost every personal right,—inclines one to the thought that the subject was in its infancy at the time of the first appearance of the book.

In the preparation of the present edition, I have endeavored to corral every important adjudication, which has been made by the State and Federal courts, on the various branches of the subject; and to include suggestive arguments for or against the constitutionality of regulations of personal rights, whether the courts have passed upon them or not.

It has been gratifying for me to note and record here, that the first edition of the book has been quoted by the courts with approval in hundreds of cases; and that, while some of my opinions and arguments are still in opposition to judicial opinion, the number of such cases is surprisingly small, when one bears in mind how fruitful the subject is with opportunity for intelligent differences of opinion.

The reader will find important additions to the text and citations in every chapter of the book. But the most important and the most extensive additions have been made to the chapters on Property, Corporations, Federal Police Power; and, especially, to the chapter on Trades and Occupations. The great economic war, which was predicted in the preface of the first edition, has been begun, and has been increasing in intensity and scope for the past ten years, making profound changes in the economic conditions of the people, and calling for new legislative attempts at restriction, regulation and suppression. In the ninth chapter of the book, will be found a very full and complete discussion of the laws and the cases, which bear upon the subjects of liberty of contract, upon trades-unions and other labor combinations, upon the lawfulness and unlawfulness of the different labor tactics, upon industrial trusts and trade combinations, and upon monopolies, both private and governmental. A perusal of the fifteenth chapter, will disclose important new material which unfolds more clearly the limitations of the governmental control of corporate franchises.

It is the common observation of the legal profession that the interstate commerce clause of the United States Constitution is slowly but steadily, under the adjudications of the United States Supreme Court, extending the jurisdiction of the national government over the rights of person and property, which at an earlier day in our national history were within the exclusive jurisdiction of the police power of the respective States. The constitutional principles, which are involved in this tendency to centralization, are fully presented in the concluding chapter.

The preparation of this new and enlarged edition of a book, which has been so generously received and commended by the profession, has been a labor of love; and I bespeak for it a continuance of that distinguished consideration.

C. G. T.

New York City,
Aug. 15, 1900.

[Back to Table of Contents]

STATE AND FEDERAL CONTROL OF PERSONS AND PROPERTY. Vol. I.

CHAPTER I.

SCOPE OF THE GOVERNMENT CONTROL AND REGULATION OF PERSONAL RIGHTS.

[Back to Table of Contents]

§ 1.

Police Power—Defined And Explained.—

The private rights of the individual, apart from a few statutory rights, which when compared with the whole body of private rights are insignificant in number, do not rest upon the mandate of municipal law as a source.1 They belong to man in a state of nature; they are natural rights, rights recognized and existing in the law of reason. But the individual, in a state of nature, finds in the enjoyment of his own rights that he transgresses the rights of others. Nature wars upon nature, when subjected to no spiritual or moral restraint. The object of government is to impose that degree of restraint upon human actions, which is necessary to the uniform and reasonable conservation and enjoyment of private rights. Government and municipal law protect and develop, rather than create, private rights. The conservation of private rights is attained by the imposition of a wholesome restraint upon their exercise, such a restraint as will prevent the infliction of injury upon others in the enjoyment of them; it involves a provision of means for enforcing the legal maxim, which enunciates the fundamental rule of both the human and the natural law, *sic utere tuo, ut alienum non lædas.* The power of the government to impose this restraint is called Police Power. By this "general police power of the State, persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health and prosperity of the State; of the perfect right in the legislature to do which no question ever was or upon acknowledged general principles ever can be made, so far as natural persons are concerned."1 Blackstone defines the police power to be "the due regulation and domestic order of the kingdom, whereby the inhabitants of a State, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood and good manners, and to be decent, industrious and inoffensive in their respective stations."2 Judge Cooley says:3 "The police of a State, in a comprehensive sense, embraces its whole system of internal regulation, by which the State seeks not only to preserve the public order and to prevent offenses against the State, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as it is reasonably consistent with a like enjoyment of rights by others."1 The continental jurists include, under the term *PolicePower,* not only those restraints upon private rights which are imposed for the general welfare of all, but also all the governmental institutions, which are established with public funds for the better promotion of the public good, and the alleviation of private want and suffering. Thus they would include the power of the government to expend the public moneys in the construction and repair of roads, the establishment of hospitals and asylums and colleges, in short, the power to supplement the results of individual activity with what individual activity cannot accomplish. "The governmental provision for the public security and welfare in its daily necessities, that provision which establishes the needful and necessary, and therefore appears as a bidding and forbidding power of the State, is the scope and character of the police."1 But in the

present connection, as may be gathered from the American definitions heretofore given, the term must be confined to the imposition of restraints and burdens upon persons and property. The power of the government to embark in enterprises of public charity and benefit can only be limited by the restrictions upon the power of taxation, and to that extent alone can these subjects in American law be said to fall within the police power of the State.

It is to be observed, therefore, that the police power of the government, as understood in the constitutional law of the United States, is simply the power of the government to establish provisions for the enforcement of the common as well as civil-law maxim, *sic utere tuo ut alienum non lædas.* "This police power of the State extends to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the State. According to the maxim, *sic utere tuo ut alienum non lædas,* it being of universal application, it must of course be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others."1 Any law which goes beyond that principle, which undertakes to abolish rights, the exercise of which does not involve an infringement of the rights of others, or to limit the exercise of rights beyond what is necessary to provide for the public welfare and the general security, cannot be included in the police power of the government. It is a governmental usurpation, and violates the principles of abstract justice, as they have been developed under our republican institutions.

In Lawton *v.* Steele2 the Court say: "The extent and limits of what is known as the police power have been a fruitful subject of discussion in the appellate courts of nearly every State in the Union. It is universally conceded to include everything essential to the public safety, health and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance. Under this power it has been held that the State may order the destruction of a house falling to decay or otherwise endangering the lives of passers-by; the demolition of such as are in the path of a conflagration; the slaughter of diseased cattle; the destruction of decayed or unwholesome food; the prohibition of wooden buildings in cities; the regulation of railways and other means of public conveyance, and of interments in burial grounds; the restriction of objectionable trades to certain localities; the compulsory vaccination of children; the confinement of the insane or those afflicted with contagious diseases; the restraint of vagrants, beggars, and habitual drunkards; the suppression of obscene publications and houses of ill-fame; and the prohibition of gambling houses and places where intoxicating liquors are sold. Beyond this, however, the State may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests. To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. In other

words, its determination as to what is a proper exercise of its police powers, is not final or conclusive, but is subject to the supervision of the courts."

In Ex parte Lentzsch,1 the Court say: "Upon the question thus presented of the proper limits of the police power much might be written, and much, indeed, will have to be written, ere just bounds are set to its exercise. But in this case neither time permits nor necessity demands the [its] consideration. Still it may be suggested in passing that our government was not designed to be paternal in form. We are a self-governing people, and our just pride is that our laws are made by us as well as for us. Every individual citizen is to be allowed so much liberty as may exist without impairment of the equal rights of his fellows. Our institutions are founded upon the conviction that we are not only capable of self-government as a community, but, what is the logical necessity, that we are capable to a great extent, of individual self-government. If this conviction shall prove ill-founded, we have built our house upon sand. The spirit of a system such as ours is therefore at total variance with that which, more or less veiled, still shows in the paternalism of other nations. It may be injurious to health to eat bread before it is twenty-four hours old, yet it would strike us with surprise to see the legislature making a crime of the sale of fresh bread. We look with disfavor upon such legislation as we do upon the enactment of sumptuary laws. We do not even punish a man for his vices, unless they be practiced openly, so as to lead to the spread of corruption, or to breaches of the peace, or to public scandal. In brief, we give to the individual the utmost possible amount of personal liberty, and, with that guaranteed to him, he is treated as a person of responsible judgment, not as a child in his non-age, and is left free to work out his destiny as impulse, education, training, heredity, and environment direct him. So, while the police power is one whose proper use makes most potently for good, in its undefined scope, and inordinate exercise lurks no small danger to the republic; for the difficulty which is experienced in defining its just limits and bounds affords a temptation to the legislature to encroach upon the rights of citizens with experimental laws, none the less dangerous because well meant."1

[Back to Table of Contents]

§ 2.

The Legal Limitations Upon Police Power.—

This is the subject of the present work, viz.: The legal limitations upon the police power of American governments, national and State. Where can these limitations be found, and in what do they consist? The legislature is clearly the department of the government which can and does exercise the police power, and consequently in the limitations upon the legislative power, are to be found the limitations of the police power. Whether there be other limitations or not, the most important and the most clearly defined are to be found in the national and State constitutions. Whenever an act of the legislature contravenes a constitutional provision, it is void, and it is the duty of the courts so to declare it, and refuse to enforce it. But is it in the power of the judiciary to declare an act of the legislature void, because it violates some abstract rule of justice, when there is no constitutional prohibition? Several eminent judges have more or less strongly insisted upon the doctrine that the authority of the legislature is not absolute in those cases in which the constitution fails to impose a restriction; that in no case can a law be valid, which violates the fundamental principles of free government, and infringes upon the original rights of men, and some of these judges claim for the judiciary, the power to annul such an enactment, and to forbid its enforcement.1 Judge Chase expresses himself as follows: "I cannot subscribe to the omnipotence of a State legislature, or that it is absolute and without control, although its authority should not be expressly restrained by the constitution or fundamental law of the State. The people of the United States erected their constitutions or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty, and to protect their persons and property from violence. The purposes for which we enter into society, will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it. The nature and ends of legislative power will limit the exercise of it. This fundamental principle flows from the very nature of our free republican governments, that no man should be compelled to do what the laws do not require, nor to refrain from acts which the laws permit. There are acts which the Federal or State legislature cannot do, without exceeding their authority. There are certain vital principles in our free republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law, or to take away that security for personal liberty or private property for the protection whereof the government was established. An act of the legislature (for I cannot call it a law), contrary to the great first principle of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of a law in governments, established on express compact and on republican principles, must be determined by the nature of the power on which it is founded. * * * The legislature may enjoin, permit, forbid and punish; they may declare new crimes, and establish rules of conduct for all its citizens in future cases; they may command what is right, and prohibit what is wrong, but they cannot change innocence into guilt, or punish

innocence as a crime; or violate the right of an antecedent lawful private contract, or the right of private property. To maintain that our Federal or State legislature possesses such powers, if they had not been expressly restrained, would in my opinion be a political heresy, altogether inadmissible in our free republican governments." But notwithstanding the opinions of these eminently respectable judges, the current of authority, as well as substantial constitutional reasoning, is decidedly opposed to the doctrine. It may now be considered as an established principle of American law that the courts, in the performance of their duty to confine the legislative department within the constitutional limits of its power, cannot nullify and avoid a law, simply because it conflicts with the judicial notions of natural right or morality, or abstract justice."[1]

While it is true that the courts have no authority to override the legislative judgment on the question of expediency or abstract justice in the enactment of a law, and if a case, arising under the statute, should come up before them for adjudication, they are obliged by their official oaths to enforce the statute notwithstanding it offends the commonest principles of justice, it is nevertheless true that a law which does not conform to the fundamental principles of free government and natural justice and morality, will prove ineffectual and will become a dead letter. No law can be enforced, particularly in a country governed directly by the popular will, which does not receive the moral and active support of a large majority of the people; and a law, which violates reason and offends against the prevalent conceptions of right and justice, will be deprived of the power necessary to secure its enforcement. The passage of such statutes, however beneficent may be the immediate object of them, will not only fail of attaining the particular end in view, but it tends on the one hand to create in those who are likely to violate them a contempt for the whole body of restrictive laws, and on the other hand, to inspire in those, from whom the necessary moral support is to be expected, a fear and distrust, sometimes hate, of legal restraint which is very destructive of their practical value. And such is particularly the case with police regulations. When confined within their proper limits, viz.: to compel every one to so use his own and so conduct himself as not to injure his neighbor or infringe upon his rights, police regulations should, and usually would, receive in a reasonably healthy community the enthusiastic support of the entire population. There have been, however, so many unjustifiable limitations imposed upon private rights and personal liberty, sumptuary laws, and laws for the correction of personal vice, laws which have in view the moral and religious elevation of the individual against his will, and sometimes in opposition to the dictates of his conscience (all of which objects, however beneficent they may be, do not come within the sphere of the governmental activity), that the modern world looks with distrust upon any exercise of police power; and however justifiable, reasonable and necessary to the general welfare may be a particular police regulation, it often meets with a determined opposition, and oftener with a death-dealing apathy on the part of those who are usually law-abiding citizens and active supporters of the law. Goethe makes Mephistopheles give the cause of this opposition in the following expressive language:—

> "Ich weisz mich trefflich mit der Polizei
> Doch mit dem Blutbann schlecht mich abzufinden,"

which, roughly translated, means, “I can get along very well with the police, but badly with the hereditary monopoly.” (Blutbann.)1

But these are considerations, which can alone be addressed to the legislative department of the government. If an unwise law has been enacted, which does not infringe upon any constitutional limitation, the only remedy is an appeal to the people directly, or through their representatives, to repeal the law. The courts have no authority to interpose.

[Back to Table of Contents]

§ 3.

Construction Of Constitutional Limitations.—

But although these fundamental principles of natural right and justice cannot, in themselves, furnish any legal restrictions upon the governmental exercise of police power, in the absence of express or implied constitutional limitations, yet they play an important part in determining the exact scope and extent of the constitutional limitations. Wherever by reasonable construction the constitutional limitation can be made to avoid an unrighteous exercise of police power, that construction will be upheld, notwithstanding the strict letter of the constitution does not prohibit the exercise of such a power. The unwritten law of this country is in the main against the exercise of police power, and the restrictions and burdens, imposed upon persons and private property by police regulations, are jealously watched and scrutinized. "The main guaranty of private rights against unjust legislation is found in that memorable clause in the bill of rights, that no man shall be deprived of life, liberty or property, without due process of law. This guaranty is not construed in any narrow or technical sense. The right to life may be invaded without its destruction. One may be deprived of his liberty in a constitutional sense without putting his person in confinement. Property may be taken without manual interference therewith, or its physical destruction. The right to life includes the right of the individual to his body in its completeness and without its dismemberment, the right to liberty, the right to exercise his faculties and to follow a lawful avocation for the support of life, the right of property, the right to acquire property and enjoy it in any way consistent with the equal rights of others and the just exactions and demands of the State."[1]

In a late case[2] the Supreme Court expresses itself as follows: "The Fourteenth Amendment is not confined to the protection of citizens." It says: "Nor shall any State deprive *any person* of life, liberty or property without due process of law; nor deny to *any person* within its jurisdiction the equal protection of the laws. These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws."

* * * * * * * * * * *

"When we consider the nature and theory of our institutions of governments, the principles upon which they are supposed to rest and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true, that there must always be lodged somewhere, and in some person or body, the authority of

final decision; and in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of public opinion or by means of the suffrage. But the fundamental rights to life, liberty and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth 'may be a government of laws and not of men.' For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country, where freedom prevails, as being the essence of slavery itself."

In searching for constitutional restrictions upon police power, not only may resort be had to those plain, exact and explicit provisions of the constitution, but those general clauses, which have acquired the name of "glittering generalities," may also be appealed to as containing the germ of constitutional limitation, at least in those cases in which there is a clearly unjustifiable violation of private right. Thus, almost all of the State constitutions have, incorporated in their bills of rights, the clause of the American Declaration of Independence that all men "are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness." If, for example, a law should be enacted, which prohibited the prosecution of some employment which did not involve the infliction of injury upon others, or which restricts the liberty of the citizen unnecessarily, and in such a manner that it did not violate any specific provision of the constitution, it may be held invalid, because in the one case it interfered with the inalienable right of property, and in the other case it infringed upon the natural right to life and liberty. "There is living power enough in those abstractions of the State constitutions, which have heretofore been regarded as mere 'glittering generalities,' to enable the courts to enforce them against the enactments of the Legislature, and thus declare that all men are not only created free and equal, but remain so, and may enjoy life and pursue happiness in their own way, provided they do not interfere with the freedom of other men in the pursuit of the same objects."[1] This is a novel doctrine, and one which perhaps is as liable to give rise to dangerous encroachments by the judiciary upon the sphere and powers of the legislature, as the doctrine that a law is invalid which violates abstract principles of justice. If it be recognized as an established rule of constitutional law, it must certainly be confined in its application to clear cases of natural injustice. Wherever there is any doubt as to the legitimate character of legislation, it should be solved in favor of the power of the legislature to make the enactment. In all cases the courts should proceed with caution in the enforcement of this most elastic constitutional provision.

While we find a tendency in one direction to stretch the constitutional restrictions over a great many cases of legislation, which would not fall within the strict letter of the constitution, in order that due force and effect may be given to the fundamental principles of free government; on the other hand, where the letter of the constitution would prohibit police regulations, which by all the principles of constitutional government have been recognized as beneficent and permissible restrictions upon the

individual liberty of action, such regulations will be upheld by the courts, on the ground that the framers of the constitution could not possibly have intended to deprive the government of so salutary a power, and hence the spirit of the constitution permits such legislation, although a strict construction of the letter may prohibit. But in such a case the regulation must fall within the enforcement of the legal maxim, *sic utere tuo, ut alienum non lædas.* "Powers which can only be justified on this specific ground (that they are police regulations) and which would otherwise be clearly prohibited by the constitution, can be such only as are so clearly necessary to the safety, comfort and well-being of society, or so imperatively required by the public necessity, as to lead to the rational and satisfactory conclusion that the framers of the constitution could not, as men of ordinary prudence and foresight, have intended to prohibit their exercise in the particular case, notwithstanding the language of the prohibition would otherwise include it."1 And in all such cases it is the duty of the courts to determine whether the regulation is a reasonable exercise of a power, which is generally prohibited by the constitution. "It is the province of the law-making power to determine when the exigency exists for calling into exercise the police power of the State, but what are the subjects of its exercise is clearly a judicial question."2

Chief Justice Marshall said in Marburg *v.* Madison:3 "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed they are under a solemn duty—to look at the substance of things whenever they enter upon the inquiry whether the legislature had transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relations to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the court to so adjudge, and thereby give effect to the constitution."

[Back to Table of Contents]

§ 4.

The Principal Constitutional Limitations.—

The principal constitutional limitations, which are designed to protect private rights, against the arbitrary exercise of governmental power, and which therefore operate to limit and restrain the exercise of police power, are the following:—

1. No bill of attainder or *ex post facto* law shall be passed by the United States,1 or by the States.2

2. No State shall pass any law impairing the obligation of a contract.3

3. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.4

4. The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.5

5. No soldier shall, in time of peace, be quartered in any house without the consent of the owner; nor in time of war, but in a manner to be prescribed by law.6

6. The right of the people to keep and bear arms shall not be infringed.7

7. Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people, peaceably to assemble, and to petition the government for a redress of grievances.8

8. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.1

9. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.2

10. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.3

11. The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.4

12. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.5

13. The right of the citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude.1

Here are given only the provisions of the Federal constitution, but they either control the action of the States, as well as of the United States, or similar provisions have been incorporated into the bills of rights of the different State constitutions, so that the foregoing may be considered to be the chief limitations in the United States upon legislative interference with natural rights. Where the States are not expressly named in connection with any clause of the United States constitution, the provision is construed by the best authorities to apply solely to the United States.2 But all of these limitations have been repeated in the State bill of rights, with some little but unimportant change of phraseology, together with other more minute limitations.

[Back to Table of Contents]

§ 5.

Table Of Private Rights.—

Police power, being the imposition of restrictions and burdens upon the natural and other private rights of individuals, it becomes necessary to tabulate and classify these rights, and in presenting for discussion the field and scope for the exercise of police power, the subject-matter will be subdivided according to the rights upon which the restrictions and burdens are imposed. The following is

THE TABLE OF PRIVATE RIGHTS.

(*a.*) Personal rights.

1. Personal security	—Life.
	—Limb.
	—Health.
	—Reputation.
2. Personal liberty.	
3. Private property	—Real.
	—Personal.

(*b.*) Relative Rights

arising between	1. Husband and wife.
	2. Parent and child.
	3. Guardian and ward.
	4. Master and servant.

(*c.*) Statutory Rights

embracing all those rights which rest upon legislative grant.

[Back to Table of Contents]

CHAPTER II.

GOVERNMENT REGULATION OF PERSONAL SECURITY.

[Back to Table of Contents]

§ 10.

Security To Life.—

The legal guaranty of the protection of life is the highest possession of man. It constitutes the condition precedent to the enjoyment of all other rights. A man's life includes all that is certain and real in human experience, and since its extinction means the deprivation of all temporal rights, the loss of his own personality, so far as this world is concerned, the cause or motive for its destruction must be very urgent, and of the highest consideration, in order to constitute a sufficient justification. If there be any valid ground of justification in the taking of human life, it can only rest upon its necessity as a means of protection to the community against the perpetration of dangerous and terrible crimes by the person whose life is to be forfeited. When a person commits a crime, that is, trespasses upon the rights of his fellow-men, he subjects his own rights to the possibility of forfeiture, including even the forfeiture of life itself; and the only consideration, independently of constitutional limitations, being, whether the given forfeiture, by exerting a deterrent influence, will furnish the necessary protection against future infringements of the same rights. That is, of course, only a question of expedience addressed to the wise discretion of legislators, and does not concern the courts. Except as a punishment for crime, no man's life can be destroyed, not even with his consent. Suicide, itself, is held to be a crime, and one who assists another in the commission of suicide is himself guilty of a crime.1 This rule of the common law is in apparent contradiction with the maxim of the common law, which in every other case finds ready acquiescence, viz.: an injury (*i. e.* a legal wrong) is never committed against one who voluntarily accepts it, *volenti non fit injuria.* If a crime be in every case a trespass upon the rights of others2 suicide is not a crime, and it would not be a crime to assist one "to shuffle off this mortal coil." But the dread of the uncertainties of the life beyond the grave so generally "makes us rather bear those ills we have, than fly to others that we know not of," that we instinctively consider suicide to be the act of a deranged mind; and on the hypothesis that no sane man ever commits suicide the State may very properly interfere to prevent self-destruction, and to punish those who have given aid to the unfortunate man in his attack upon himself, or who have with his consent, or by his direction, killed a human being. But if we hold suicide to be in any case the act of a sane man, I cannot see on what legal grounds he can be prevented from taking his own life. It would be absurd to speak of a man being under a legal obligation to society to live as long as possible. The immorality of the act does not make it a crime,3 and since it is not a trespass upon the rights of any one, it is not an act that the State can prohibit. But even if suicide be declared a crime, the act has carried the criminal beyond the jurisdiction of the criminal courts, and consequently no punishment could be inflicted on him. The common law in providing that the body of a suicide should be buried at the cross-roads with a stake driven through it, and that his property shall be forfeited to the crown, violated the fundamental principle of constitutional law that no man can be condemned and punished for an offense, except after a fair trial by a court of competent jurisdiction, in which the accused is given an opportunity to be heard in his

own defense. It is somewhat different where one man kills another at the latter's request. If it be held that the man who makes the request is sane, the killing is no more a crime than if it was done by the unfortunate man himself. But in consideration of the difficulty in proving the request, and the frequent opportunities for felonious murders the allowance of such deeds would afford, the State can very properly prohibit the killing of one man by another at the former's request. These considerations would justify this exercise of police power, and in only one case is it supposed that any fair reason may be given for allowing it, and that is, where one is suffering from an incurable and painful disease. If the painful sufferer, with no prospect of a recovery or even temporary relief from physical agony, instead of praying to God for a deliverance, should determine to secure his own release, and to request the aid of a physician in the act, the justification of the act on legal grounds may not be so difficult. But even in such a case public, if not religious, considerations would justify a prohibition of the homicide.

[Back to Table of Contents]

§ 11.

Capital Punishment, When Cruel And Unusual.—

That capital punishment may be imposed for the commission of crimes against the life of another, and crimes against those rights of personal security, which are in the estimation of the generality of mankind as dear as life itself, for example, arson and rape, seems to admit of no doubt, not even in the realms of reason and natural justice. Certainly there is no constitutional prohibition against its infliction for these offenses. These are *mala in se,* violations of the natural rights of man, and there is in the breast of every human being a natural fear of punishment, proportionate to each and every violation of human rights. In the absence of a regularly established society, in a state of nature, the power to inflict this punishment for natural crimes is vested in every individual, since every one is interested in providing the necessary protection for life. "Whereof," Mr. Blackstone says, "the first murderer, Cain, was so sensible, that we find him expressing his apprehensions, that *whoever* should find him would slay him."1 In organized society, a supreme power being established, which is able and is expressly designed to provide for the public security, the government succeeds to this natural right of the individual. "In a state of society this right is transferred from individuals to the sovereign power, whereby men are prevented from being judges in their own causes, which is one of theevils that civil government was intended to remedy."2 These cases of capital punishment are readily justified, but it would seem to be a matter of very grave doubt, certainly on rational grounds, whether the legislature had the power to provide capital punishment for the commission of a crime which is only a *malum prohibitum,* an act which by the law of nature is not a violation of human rights. But whatever may be the final settlement of this question, by the common law capital punishment was inflicted for numerous crimes of very different characters and grades of heinousness. Says Blackstone: "It is a melancholy truth, that among the variety of actions which men are daily liable to commit, no less than a hundred and sixty have been declared by act of Parliament to be felonies without benefit of clergy; or in other words, to be worthy of instant death."1 Sir Matthew Hale justifies this practice of inflicting capital punishment for crimes of human institution in the following language: "When offenses grow enormous, frequent and dangerous to a kingdom or state, destructive or highly pernicious to civil societies, and to the great insecurity and danger of the kingdom or its inhabitants, severe punishment and even death itself is necessary to be annexed to laws in many cases by the produce of law-givers."2

It may now be considered as a settled doctrine that, in the absence of an express constitutional prohibition, the infliction of capital punishment rests entirely in the discretion of the legislature. The only constitutional limitation which can bear upon the subject under discussion, is that found in both the national and State constitutions, which prohibits the imposition of "cruel and unusual punishments."3 Capital punishment in itself is not "cruel," but the mode of its infliction may be "cruel and unusual," and hence contravene this constitutional provision. Thus, for example,

would be those cruel punishments of colonial times and of the common law, such as burning at the stake, breaking on the wheel, putting to the rack, and the like. In the present temper of public opinion, these would undoubtedly be considered "cruel and unusual punishments," and therefore, forbidden by the constitution.4 But would the infliction of capital punishment for offenses, not involving the violation of the right to life and personal security, be such a "cruel and unusual" punishment, as that it would be held to be forbidden by this constitutional provision? It would seem to me that the imposition of the death penalty for the violation of the revenue laws, *i. e.,* smuggling, or the illicit manufacture of liquors, or even for larceny or embezzlement, would properly be considered as prohibited by this provision as being "cruel and unusual." But if such a construction prevailed, it would be difficult to determine the limitations to the legislative discretion.

There has been so little litigation over this provision of our constitutions, that it is not an easy matter to say what is meant by the clause. Judge Cooley says: "Probably any punishment declared by statute for any offense, which was punished in the same way at common law, could not be regarded as cruel and unusual in the constitutional sense. And probably any new statutory offense may be punished to the extent and in the mode permitted by the common law for offenses of a similar nature."1 Capital punishment can be inflicted, in organized society, only under the warrant of a court of justice, having the requisite jurisdiction, and it must be done by the legal officer, whose duty it is to execute the decrees of the court. The sentence of the court must be followed implicitly. The sheriff is not authorized to change the mode of death, without becoming guilty of the crime of felonious homicide.1

[Back to Table of Contents]

§ 12.

Security To Limb And Body—General Statement.—

This right is as valuable, and as jealously guarded against violation, as the primary right to life. Not only does it involve protection against actual bodily injuries, but it also includes an immunity from the unsuccessful attempts to inflict bodily injuries, a protection against assaults, as well as batteries. This protection against the hostile threats of bodily injury is as essential to one's happiness as immunity from actual battery.2 But however high an estimate may be placed generally upon this right of personal security of limb and body, there are cases in which the needs of society require a sacrifice of the right; usually, however, where the wrongful acts of the person whose personal security is invaded, have subjected him to the possibility of forfeiture of any right as a penalty for wrong-doing.

[Back to Table of Contents]

§ 13.

Corporal Punishment—When A Cruel And Unusual Punishment.—

The whipping-post constituted at one time a very common instrument of punishment, and in the colonial days of this country it ornamented the public square of almost every town. At present corporal punishment is believed to be employed only in Delaware and Maryland.3 It was much resorted to in England as a punishment for certain classes of infamous crimes. "The general rule of the common law was that the punishment of all infamous crimes should be disgraceful; as the pillory for every species of *crimen falsi,* as forgery, perjury and other offenses of the same kind. Whipping was more peculiarly appropriated to petit larceny and to crimes which betray a meanness of disposition and a deep taint of moral depravity."1 It does seem as if there are crimes so infamous in character, and betoken such a hopeless state of moral iniquity, that they can only be controlled and arrested by the degrading punishment of a public whipping. It is now being very generally suggested as the only appropriate punishment for those cowardly creatures who lay their hands in violence upon their defenseless wives. But public opinion is still strongly opposed to its infliction in any case. The punishment is so degrading that its infliction leaves the criminal very little chance for reformation, unless he betakes himself to a land, whither the disgrace will not follow him, or be generally known.2

In respect to the constitutional right to impose the penalty of corporal punishment for crime, Judge Cooley says: "We may well doubt the right to establish the whipping-post and the pillory in the States in which they were never recognized as instruments of punishment, or in States whose constitutions, revised since public opinion had banished them, have forbidden cruel and unusual punishment. In such States the public sentiment must be regarded as having condemned them as 'cruel;' and any punishment, which if ever employed at all has become altogether obsolete, must certainly be looked upon as 'unusual.' "3 The fact, that this mode of punishment has become obsolete, has made it impossible to secure any large number of adjudications on the constitutionality of a statute, which authorized or directed the infliction of corporal punishment. But so far as the courts have passed upon the question, they have decided in favor of its constitutionality, and held that whipping was not a "cruel and unusual" punishment.1 It has also been recognized as a legitimate power, in keepers of prisons and wardens of penitentiaries to administer corporal punishment to refractory prisoners.2 But whatever may be the correct view in respect to the constitutionality of laws imposing corporal punishment, this mode of punishment has now become very generally obsolete, and no court would presume to employ it upon the authority of the English common law. A statute would be necessary to revive it.3

[Back to Table of Contents]

§ 14.

Personal Chastisement In Certain Relations.—

As a natural right, in consequence of the duty imposed upon the husband, parent, guardian and master, it was conceded by the common law that they could inflict corporal punishment, respectively, upon the wife, child, pupil, ward and apprentice. But as the domestic relations, and the relative rights and duties growing out of them, will receive a more detailed treatment in a subsequent chapter, the reader is referred to that chapter.4

[Back to Table of Contents]

§ 15.

Battery In Self-defense.—

One of the primary restrictions upon individual liberty, growing out of the organization of society and the institution of government, is that which limits or takes away the right to undertake the remedy of one's own wrongs, and provides a remedy in the institution of courts and the appointment of ministerial officers, who hear the complaints of parties and condemn and punish all infractions of rights. But the natural right of protecting one's own rights can only be taken away justly where the law supplies in its place, and through the ordinary judicial channels, a reasonably effective remedy. In most cases where the remedy should be preventive, in order that it may be effectual, the law is clearly powerless to afford the necessary protection, and hence it recognizes in private persons the right to resist by the use of force all attacks upon their natural rights. The degree of force, which one is justified in using in defense of one's rights, is determined by the necessities of the case. He is authorized to use that amount of force which is necessary to repel the assailant.1 And in defending his rights, as a general rule, he may use whatever force is necessary for their protection, although it extends to the taking of life. But before using force in repelling an assault upon one's person, certainly where the necessary force would involve the taking of life, the law requires the person, who is assailed, to retreat before his assailant, and thus avoid a serious altercation as long as possible. When escape is impossible, then alone is homicide justifiable. Says Blackstone: "For which reason the law requires that the person, who kills another in his own defense, should have retreated as far as he conveniently or safely can, to avoid the violence of the assault, before he turns upon his assailant; and that not fictitiously, or in order to watch his opportunity, but from a real tenderness of shedding his brother's blood."1 In the excitement which usually attends such occurrences, it would be requiring too much of the party assailed to adjust to a nicety the exact amount of force which would be sufficient to furnish him and his rights with the necessary protection, and hence he is required to exercise that degree of care which may be expected from a reasonably prudent man under similar circumstances.2

Blackstone also justifies, in cases of extreme necessity, the taking of the life of another, for the preservation of one's own life, where there is no direct attack upon the personal security, but the circumstances, surrounding the persons, require the death of one of them. He says: "There is one species of homicide *se defendendo* where the party slain is equally innocent as he who occasions his death: and yet this homicide is also excusable from the great universal principle of self-preservation, which prompts every man to save his own life preferable to that of another, where one of them must inevitably perish. As, among others, in that case mentioned by Lord Bacon,3 where two persons being shipwrecked, and getting on the same plank, but finding it not able to save them both, one of them thrusts the other from it, whereby he is drowned. He who thus preserves his own life at the expense of another man's is excusable through unavoidable necessity, and the principle of self-defense; since both

remaining on the same weak plank is a mutual, though innocent, attempt upon, and an endangering of each other's life."4 But, of late, the doctrine has been repudiated by the English courts in a case, which has created widespread interest. A shipwreck had occurred, and some four or five persons occupied one of the life-boats. They were without provisions, and after enduring the pangs of hunger until they were almost bereft of reason, one person, a young boy, was selected by the others to die for their benefit. The boy was killed, and the others subsisted on his flesh and blood, until they were overtaken by a vessel, and carried to England. Their terrible experience was published in the papers, and the ship having been an English vessel, they were arrested on the charge of murder, and convicted, notwithstanding the strong effort of counsel to secure from the court a recognition of the principle advocated by Blackstone. A contrary doctrine is laid down by the court, that no one has a right to take the life of another to save his own, except when it is endangered by the attacks of the other person. Even in cases of the extremest necessity the higher law must be obeyed, that man shall not save his life at the expense of another, who is not responsible for the threatening danger.1

Homicide is not only justifiable when committed in defense of one's life, but it is likewise excusable, when it is necessary to the protection of a woman's chastity. She may employ whatever force is necessary to afford her protection against the assault, even to the taking of life.2 So may one use any degree of force that may be necessary to protect any member of his family, a wife, child, etc.3 So may a battery be justified which is committed in defense of one's property, both real and personal, providing, always, that the force used is not excessive.4 And where one is assaulted in one's dwelling, he is not required to retreat, but he may take the trespasser's life, if such extreme force is necessary to prevent an entrance.1 But, although one may resist to any extent the forcible taking away of any property from himself, yet homicide in resisting a simple trespass to property, where there is no violence offered to the person, is never justifiable, except in the case of one's dwelling.2

In all these cases, the assault and battery are justified, only where they are employed in protecting rights against threatened injury. One cannot use force in recovering property or rights which have been taken or denied,3 or in punishing those who have violated his rights. It is no part of one's legal rights to *avenge* the wrongs of himself and of his family.4

At common law it was the right of one, who was unlawfully disseised, to recover his lands by force of arms, using whatever force was necessary to that end. But in the reign of Richard II., a statute was passed which prohibited entries upon land, in support of one's title, "with strong hand or a multitude of people, but only in a peaceable and easy manner."5 Similar statutes have been passed in most of the States of this country, and the effect of the statute has been the subject of more or less extensive litigation. The question has been mooted from an early period, whether the purpose of the statute was to take away the common-law civil right to recover one's lawful possession by force of arms, or simply to provide a punishment for the breach of the public peace thereby occasioned. Although there are decisions, which maintain that the statute has this double effect, and that such a forcible entry would lay the lawful owner open to civil actions for trespass and for assault and battery,1 yet the

weight of authority, both in this country and England, is certainly in favor of confining the operation of the statute to a criminal prosecution for the prohibited entry. The decisions cited below maintain that the plea of *liberum tenementum* is a good plea to every action of trespass *quare clausum fregit,* and even if the tenant is forcibly expelled and suffers personal injuries therefrom, no civil action for any purpose will lie, unless the force used was greater than what was necessary to effect his expulsion.2

[Back to Table of Contents]

§ 16.

Abortion.—

In the act of abortion, there is a twofold violation of rights. In the first place, it involves a violation of personal security to the limbs and body of the woman. The fœtus is part of the body of the woman and an unnatural expulsion of it inflicts injury upon the mother. But since the maxim of the law is, *volenti non fit injuria,* there is at common law no crime of assault and battery against the woman, where she procures or assents to the abortion. But abortion involves also the destruction of the life-germ of the fœtus, which is considered, even by the common law, to be a living human being for certain purposes. Mr. Blackstone says: "Even an infant *in ventre sa mère,* or in the mother's womb, is, for many purposes, which will be specified in the course of these commentaries, treated in law as if actually born."1 But the fœtus was not supposed to have such an actual separate existence as to make abortion a crime against the unborn child, until it had reached that stage of its growth when it is said to "quicken." Consequently at common law, where an abortion is committed upon a woman, with her consent, before the child had quickened, it is no crime unless the death of the mother ensues.2 The crime of abortion is now regulated by statute in the different States, and is generally made a crime, under all circumstances, to procure the miscarriage of a pregnant woman, whether she consents to the act, or the child has not quickened, and even where she herself, unaided, attempts the abortion.

[Back to Table of Contents]

§ 17.

Compulsory Submission To Surgical And Medical Treatment.—

Although it has never been brought before the courts for adjudication, it is nevertheless a most interesting question of police power, whether a person who is suffering from disease can be forced to submit to a surgical operation or medical treatment. We can readily understand the right of a parent or guardian to compel a child to submit to necessary medical treatment, and likewise the right of the guardian or keeper of an insane person to treat him in a similar manner. So also can we justify the exercise of force in administering remedies to one who is in the delirium of fever. But can a sane, rational man or woman of mature age be forced to submit to medical treatment, though death is likely to follow from the consequent neglect? If the disease is infectious or contagious, we recognize without question the right of the State to remove the afflicted person to a place of confinement, where he will not be likely to communicate the disease to others;1 and we recognize the right of the State to keep him confined, as long as the danger to the public continues. Inasmuch as the confinement of such a person imposes a burden upon the community, all means for lessening that burden may be employed as a legitimate exercise of police power; and if a surgical operation or medical treatment be necessary to effect a cure, the patient cannot lawfully resist the treatment.

Not only is this true, but it seems that medical and surgical treatment can be prescribed, against the consent of the individual, as a preventive of contagious and infectious diseases. Thus in England, and probably in some of the United States, vaccination has been made compulsory.2 When one remembers the terrible scourges suffered from small-pox in the past, and thinks of the moderation and control of them effected by a general vaccination of the people, no one would hesitate to answer all philosophical objections to compulsory vaccination by an appeal to the legal maxim, *salus populi suprema lex.* In the United States, school boards have been very generally authorized by statute to exclude children from the privileges of the public schools, who have not been vaccinated. This law has been contested in a number of cases, on the ground that it was an unconstitutional interference with personal rights. But, in every case, the constitutionality of this exercise of police power has been sustained.1 And in Georgia a city ordinance was sustained which required every one to submit to vaccination when the small-pox was epidemic.2

A number of decisions have sustained the constitutionality of laws, which made vaccination compulsory upon school children.3 The opposition to compulsory vaccination seems to be growing, under the fostering care of the Anti-Vaccination League; and the writer has received from its secretary a number of pamphlets and other communications, which were intended to demonstrate the inequity of vaccination in general and of compulsory vaccination in particular. In accordance with the principles set forth in the text in the present section, there could be no more outrageous violation of personal security, which is guaranteed by all American

constitutions, than the compulsory vaccination of an unwilling victim, if it could be proved that vaccination was not only futile as a protection against the loathsome disease of small-pox, but positively injurious to the health of the subject. The proof of the futility of vaccination would alone take away all constitutional justification of compulsory vaccination. But the opponents of vaccination are confronted with the testimony in its favor of the most prominent physicians of the world, who unhesitatingly pronounce the treatment to be efficacious in reducing the dangers of contagion and the mortality from small-pox; while they declare it to be in no way injurious to the health of the subject.

In the face of such an array of expert testimony, it is not surprising that the courts have uniformly sustained the constitutionality of laws, which make vaccination compulsory. This expert testimony may be erroneous, as expert testimony often is; but its unreliability must be proven to the courts, in order to successfully resist the enforcement of vaccination laws.

For the same reason, viz.: the preservation of the health and life of others, where medical attendance and surgical operations are necessary to procure the successful delivery of a child, the consent of the woman is not necessary. The saving of her life and the life of the child is a sufficient justification for this invasion of the right of personal security. But where the neglect of medical treatment will not cause any injury to others, it is very questionable if any case can be suggested in which the employment of force, in compelling a subjection to medical treatment of one who refused to submit, could be justified, unless it be upon the very uncertain and indefinite ground that the State suffers a loss in the ailment of each inhabitant, which may be guarded against or cured by the proper medical treatment.

[Back to Table of Contents]

§ 18.

Security To Health—Legalized Nuisance.—

The security against all causes of injury to health and bodily comfort is also highly essential to human happiness, and those acts of individuals which produce injury to health, or seriously interfere with bodily comfort, are called nuisances and are, as a general rule, prohibited. But it is not every annoyance to health and comfort, which constitutes a nuisance.1 Where the annoyance proceeds from some natural cause, and is not the consequence of an act of some individual, it is no nuisance, if the public or private owner should fail to remove the cause of annoyance.2 Thus, it is not actionable, if the owner of swamp lands fails to drain his lands, and in consequence the neighbors are made sick by the injurious exhalations.3 Nor is it any ground for an action against a municipal corporation, that it has failed to provide proper remedies for the prevention of nuisances and other annoyances to health and bodily comfort.4 And although, as a general proposition, no one has a right to do any act which will cause injury to the health or disturb seriously the bodily comfort or mental quietude of another, yet this right of security to health and comfort cannot be left absolute in a state of organized society. It must give way to the reasonable demands of trade, commerce, and the other vital interests of society. While the State cannot take away absolutely the private rights of individuals by the legalization of nuisance,1 yet in most cases of nuisances, affecting the personal health and comfort, there is involved the consideration of what constitutes a reasonable use of one's property, and that is a question of fact, the answer to which varies according to the circumstances of each case. One is expected to submit to a reasonable amount of discomfort for the convenience or benefit of his neighbor. If a discomfort were wantonly caused from malice or wickedness, a slight degree of inconvenience might be sufficient to render it actionable; but if it were to result from pursuing a useful employment in a way which but for the discomfort to others would be reasonable and lawful, it is perceived that the position of both parties must be regarded, and that what would have been found wholly unreasonable before may appear to be clearly justified by the circumstances.2 Instead of being a question of personal health and comfort on the one hand, and a profitable use of property on the other hand, the question is, on whom in equity should the loss fall, where two adjoining or contiguous land proprietors find their interests clashing in the attempted use of the land by one for a purpose or trade, which causes personal discomfort to the other, who is residing upon his land. The injury to the personal comfort and health is not in such a case an absolute one. For, as was said by the court in one of the leading cases,1 "the people who live in such a city, *i. e.,* where the principal industry consists of manufactures, or within its sphere of influence, do so of choice, and they voluntarily subject themselves to its peculiarities and its discomforts for the greater benefits they think they derive from their residence or business there." If a noisome or unhealthy trade is plied in a part of a city, which is given up principally to residences, it might be considered a nuisance, while the same trade might, in a less populous neighborhood, or in one which is devoted to trade and manufacturing, be considered altogether permissible.2

[Back to Table of Contents]

§ 19.

Security To Reputation—Privileged Communications.3 —

A man's reputation, the opinion entertained of him by his neighbors, is another valuable possession, and the security to which is most jealously, but, it must be confessed in most cases, ineffectually guarded against infractions. The breath of suspicion, engendered by a slanderous lie, will tarnish a fair name, long after the injurious statement has been proved to be an unfounded falsehood. But the aim of all legislation on the subject is to provide the proper protection against slander and libel, and failure in ordinary cases is caused by the poverty of the means of penal judicature, and does not arise from any public indifference. But dear to man as is the security to reputation, there are cases in which it must yield to the higher demands of public necessity and general welfare. Malice is generally inferred from a false and injurious statement or publication, and the slanderer and libeler are punished accordingly. But there are special cases, in which for reasons of public policy, or on account of the rebuttal of the presumption of malice by the co-existence of a duty to speak or an active interest in the subject, the speaker or writer is held to be "privileged," that is, relieved from liability for the damage which has been inflicted by his false charges. These privileged communications are divided into two classes: first, those which are made in a public or official capacity, and which for reasons of public policy are not permitted to be the subject of a judicial action; and secondly, all those cases in which the circumstances rebut the presumption of malice. In these cases of the second class, the privilege is only partial. As already stated, the circumstances are held to rebut the presumption of malice, and throws upon the plaintiff the burden of proving affirmatively that the defendant was actuated by malice in making the false statement which has injured the plaintiff's reputation. In these cases the proof of express malice revives the liability of the alleged slanderer.1 As Mr. Cooley says, "they are generally cases in which a party has a duty to discharge which requires that he should be allowed to speak freely and fully that which he believes; or where he is himself directly interested in the subject-matter of the communication, and makes it with a view to the protection or advancement of his own interest, or where he is communicating confidentially with a person interested in the communication, and by way of advice."1 The cases of a private nature are very numerous, and for a full and exhaustive discussion of them, reference must be made to some work on slander and libel. Under this rule of exemption are included answers to inquiries after the character of one who had been employed by the person addressed, and who is soliciting employment from one who makes the inquiry,2 the answer of all inquiries between tradesmen concerning the financial credit and commercial reputation of persons who desire to enter into business dealings with the inquirers.3 While the private reports of mercantile agencies are privileged,4 the published reports of such agencies, which are distributed among the customers, are held not to constitute one of the privileged classes.5

All *bona fide* communications are privileged, where there is a confidential relation of any kind, existing between the parties in respect to the subject-matter of the inquiry. "All that is necessary to entitle such communications to be regarded as privileged is, that the relation of the parties should be such as to afford reasonable ground for supposing an innocent motive for giving the information, and to deprive the act of an appearance of officious intermeddling with the affairs of another."[1]

The first class of privileged communications, enumerated above, is absolutely privileged, and there is no right of action, even though the false statement is proved to be prompted by malice. They are few in number, and the privilege rests upon public policy, and usually have reference to the administration of some branch of the government. They will be discussed in a regular order.

[Back to Table of Contents]

§ 20.

Privilege Of Legislators.—

In order that the legislator may, in the performance of his official duties, feel himself free from all restraining influences and able to act without fear or favor of anyone whatsoever, it is usually provided by a constitutional clause that he shall not be subjected elsewhere to any legal liability for any statement he may have made in speech or debate.2 Inasmuch as this absolute privilege is established in behalf of the legislator, not for his own benefit, but with a view to promote the public good, and inasmuch as the houses of Congress and of the State legislatures have the power to punish their members for disorderly behavior and unparliamentary language, a most liberal construction is given to this constitutional provision. "These privileges (the privilege of legislators from arrest and from liability for false statements in speech or debate) are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions civil or criminal. I therefore think that the article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate, but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature and in the execution of the office; and I would define the article as securing to every member exemption from prosecution for everything said or done by him, as a representative, in the exercise of the functions of that office, without inquiring whether the exercise was regular and according to the rules of the house, or irregular and against their rules. I do not confine the member to his place in the house, and I am satisfied that there are cases in which he is entitled to this privilege when not within the walls of the representatives' chamber. He cannot be exercising the functions of his office as the member of a body, unless the body be in existence. The house must be in session to enable him to claim this privilege, and it is in session, notwithstanding occasional adjournments for short intervals for the convenience of its members. If a member, therefore, be out of the chamber, sitting in committee, executing the commission of the house, it appears to me that such a member is within the reason of the article, and ought to be considered within the privilege. The body of which he is a member is in session, and he, as a member of that body, is in fact discharging the duties of his office. He ought, therefore, to be protected from civil or criminal prosecutions for everything said or done by him in the exercise of his functions, as a representative, in debating or assenting to or drafting a report. Neither can I deny the member his privilege when executing the duties of his office, in convention of both houses, although the convention should be holden in the senate chamber."1 But even to so absolute a privilege as this, there is a limitation. Because a man holds the position of a legislator, the public interests do not require that he be given unlimited license to slander whom he pleases, and to screen himself from a just retribution under his legislative privilege. It is only when he is acting in his official capacity, that he can claim this protection. If, therefore, the slanderous

statement has no relevancy to any public business or duty, is not even remotely pertinent to public questions then under discussion, the legislator in his utterance of them subjects himself to civil and criminal liability.2 A similar exemption from responsibility for official utterances is guaranteed to the President of the United States and to the governors of the several States.3

[Back to Table of Contents]

§ 21.

Privilege In Judicial Proceedings.—

The object of all judicial proceedings is the furtherance of justice by preventing or punishing wrongs and providing protection to rights. Although the law does not support, and is not designed to foster, a litigious spirit, yet whenever one, from all the facts within his knowledge, is justified in believing that he has suffered a wrong; in other words, if the facts within his knowledge make out a *prima facie* cause of action, he has a right to call to his aid the whole power of the law in the protection and enforcement of his rights, and it is to the public interest that a sufficient remedy be provided, and a resort to the courts be encouraged, in order to diminish the temptation, which is always present, to redress one's own wrongs. Now, if one, in stating his cause of action to the court, will subject himself to liability for every mistake of fact that he might innocently make, appeals to the courts in such cases would thus be discouraged. It is therefore consonant with the soundest public policy, to protect from civil liability all false accusations contained in the affidavits, pleadings, and other papers, which are preliminary to the institution of a suit. But the courts are not to be made the vehicles for slanderous vilification, and hence the false accusations are privileged only when made in good faith, with the intention to prosecute, and under circumstances, which induced the affirmant, as a reasonably prudent man, to believe them to be true. The good faith rebuts the presumption of malice, and the affiant is protected under his privilege, as long as the statement is pertinent to the cause of action, and where he is not actuated by malice in making it. If the statement is not pertinent, or if express malice be proved, the liability attaches.[1] All allegations in pleadings, if pertinent, are said to be absolutely privileged,[2] except where the libelous words in the pleadings refer to third person, and not to the defendant. Then they are only privileged, when they are pertinent and are pronounced in good faith.[1] Not only are false statements privileged, when made in preliminary proceedings, but a false statement has also been held to be privileged, where it has been made to one, after the commission of a crime, with a view to aid him in discovering the offender and bringing him to justice.[2] And so, likewise, is a paper privileged, which is signed by several persons, who thereby agree to prosecute others, whose names are given in the paper, and who are therein charged with the commission of a crime.[3]

In the same manner is the report of the grand jury privileged, notwithstanding, in making it, they have exceeded their jurisdiction.[4]

When the case is called up in court for trial, the chief aim of the proceeding is the ascertainment of the truth, and all the protections thrown around the *dramatis personæ* in a judicial proceeding are designed to bring out the truth, and to insure the doing of justice. We therefore find as a familiar rule of law, that no action will lie against a witness for any injurious and false statement he might make on the witness stand. If he is guilty of perjury, he subjects himself to a criminal liability, but in no

case does he incur any civil liability.5 But he is only privileged when the statement is pertinent to the cause and voluntarily offered. He is not the judge of what is pertinent, and is protected if his statement is prompted by a question of counsel, which is not forbidden by the court.1

The statements of the judge are privileged for similar reasons,2 and in the same manner are jurors privileged in statements which they make during their deliberations upon the case.3

The most important case of privilege, in connection with judicial proceedings, is that of counsel in the conduct of the cause. In order that the privilege may prove beneficial to the party whom the counsel represents, it must afford him the widest liberty of speech, and complete immunity from liability for any injurious false statement. It is, therefore, held very generally, that the privilege of counsel is as broad as that of the legislator, and that he sustains no civil liability for false, injurious statements, however malicious an intent may have actuated their utterance, provided they are pertinent to the cause on trial.4 Nowhere is the privilege of counsel more clearly elucidated than in the following extract from an opinion of Chief Justice Shaw: "We take the rule to be well settled by the authorities, that words spoken in the course of judicial proceedings, though they are such as impute crime to another, and therefore, if spoken elsewhere, would import malice and be actionable in themselves, are not actionable, if they are applicable and pertinent to the subject of inquiry. The question, therefore, in such cases is, not whether the words spoken are true, but whether they were spoken in the course of judicial proceedings, and whether they are relevant or pertinent to the cause or subject of inquiry. And in determining what is pertinent, much latitude must be allowed to the judgment and discretion of those who are intrusted with the conduct of a cause in court, and a much larger allowance made for the ardent and excited feelings with which a party or counsel, who naturally and almost necessarily identifies himself with his client, may become animated, by constantly regarding one side only of an interesting and animated controversy, in which the dearest rights of such a party may become involved. And if these feelings sometimes manifest themselves in strong invectives, or exaggarated expressions, beyond what the occasion would strictly justify, it is to be recollected that this is said to a judge who hears both sides, in whose mind the exaggerated statement may be at once controlled and met by evidence and argument of a contrary tendency from the other party, and who, from the impartiality of his position, will naturally give to an exaggerated assertion, not warranted by the occasion, no more weight than it deserves. Still, this privilege must be restrained by some limit, and we consider that limit to be this: that a party or counsel shall not avail himself of his situation to gratify private malice by uttering slanderous expressions, either against a party, witness or third person, which have no relation to the cause or subject-matter of the inquiry. Subject to this restriction, it is, on the whole, for the public interest, and best calculated to subserve the purposes of justice, to allow counsel full freedom of speech in conducting the causes and advocating and sustaining the rights of their constituents; and this freedom of discussion ought not to be impaired by numerous and refined distinctions."1

While the importance of an almost unrestricted liberty of speech to a counsel is recognized and conceded, and likewise the difficulty in restraining abuses of the privilege, still the commonness of the abuse would well make the student of police power pause to consider, if there be no remedy which, while correcting the evil, will not tend to hamper the counsel in the presentation of his client's case. Personal invective against one's opponent, the "browbeating" of hostile witnesses, are the ready and accustomed weapons of poor lawyers, while really able lawyers only resort to them when their cause is weak. If the invective was confined to the subject-matter furnished and supported by the testimony before the court, and consisted of exaggerated and abusive presentations of proven facts, while even this would seem reprehensible to us, there are no possible means of preventing it. But it is not within the privilege of counsel to gratify private malice by uttering slanderous expressions, either against a party, a witness or a third person, which have no relation to the subject-matter of the inquiry. Counsel should be confined to what is relevant to the cause, whatever may be his motive for going outside of the record. The courts are too lax in this regard. No legislation is needed; they have the power in their reach to reduce this evil, for it is an evil, to a minimum. The most salutary remedy would be raising the standard of qualification for admission to the bar. The number of poor lawyers, now legion, would be greatly reduced, and consequently the abuse of this privilege lessened.

[Back to Table of Contents]

§ 22.

Criticism Of Officers And Candidates For Office.—

When a man occupies an official position, or is a candidate for office, the people whom he serves, or desires to serve, are interested in his official conduct, or in his fitness and capacity for the office to which he aspires. It would seem, therefore, that, following out the analogy drawn from cases of private communications, affecting the reputation of persons, in whom the parties giving and receiving the communications are interested, any candid, honest, canvass of the official's or candidate's character and capacity would be privileged, and the party making the communication will not be held liable, civilly or criminally, if it proves to be false. But here, as in the case of private communications, one or the other of the parties, who were concerned in the utterance of the slander or publication of the libel, must have been interested in the subject-matter of the communication. In the case of officials and candidates for office, in order to be privileged, the criticism must be made by parties who are interested personally in the conduct and character of the official or candidate. The subject-matter of the communication must, therefore, relate to his official conduct, if the party complained of be an officer, and, if he be a candidate for office, the communication should be confined to a statement of objections to his capacity and fitness for office. Not that in either case the man's private conduct cannot be discussed under a similar privilege, although such a distinction is advocated in an English case.[1] In this case, Baron Alderson says: "It seems there is a distinction, although I must say I really can hardly tell what the limits of it are, between the comments on a man's public conduct and upon his private conduct. I can understand that you have a right to comment on the public acts of a minister, upon the public acts of a general, upon the public judgments of a judge, upon the public skill of an actor; I can understand that; but I do not know where the limit can be drawn distinctly between where the comment is to cease, as being applied solely to a man's public conduct, and where it is to begin as applicable to his private character; because, although it is quite competent for a person to speak of a judgment of a judge as being an extremely erroneous and foolish one,—and no doubt comments of that sort have great tendency to make persons careful of what they say,—and although it is perfectly competent for persons to say of an actor that he is a remarkably bad actor, and ought not to be permitted to perform such and such parts, because he performs them so ill, yet you ought not to be allowed to say of an actor that he has disgraced himself in private life, nor to say of a judge or of a minister that he has committed a felony, or anything of that description, which is in no way connected with his public conduct or public judgment; and, therefore, there must be some limits, although I do not distinctly see where those limits are to be drawn." Judge Cooley, in criticising this opinion,[1] says: "The radical defect in this rule, as it seems to us, consists in its assumption that the private character of a public officer is something aside from, and not entering into or influencing his public conduct; that a thoroughly dishonest man may be a just minister, and that a judge, who is corrupt and debauched in private life, may be pure and upright in his judgments; in other words, than an evil tree is as likely as any other to bring forth

good fruits. Any such assumption is false to human nature, and contradictory to general experience; and whatever the law may say, the general public will still assume that a corrupt life will influence public conduct, and that a man who deals dishonestly with his fellows as individuals will not hesitate to defraud them in their aggregate and corporate capacity, if the opportunity shall be given him."

Where the private character would indicate the possession of evil tendencies, which can manifest themselves in, and influence, his official conduct to the detriment of the public, it would seem but natural that the same privilege should be extended to such a communication concerning a candidate for office, as if the same evil tendency had been manifested by some previous public or official conduct. In both cases, the conduct is brought forward as evidence of the same fact, his unfitness for the office to which he aspires. But a candidate for office may possess defects of character, which cannot in any way affect the public welfare by influencing or controlling his official conduct, and inasmuch as the privilege is granted, if at all, for the sole purpose of promoting a free discussion of the fitness of the candidate for office, such an object can be attained without opening the floodgates of calumny upon a man, and depriving him of the ordinary protection of the law, because he has presented himself as a candidate for the suffrages of the people. Thus while vulgarity of habits or speech, unchastity, and the like, may be considered great social and moral evils, they can hardly be considered to affect a candidate's fitness for any ordinary office. Integrity, fidelity to trusts, are not incompatible with even libertinism, which is attested by the acts and lives of some of the public men of every country.1 Whereas dishonesty, in whatever form it may manifest itself, blind bigotry, and the like, do enter largely into the composition of one's official capacity, and consequently the discussion of any acts which tend to establish these characteristics would come within the privileges, although these acts may be of private nature. But, although it may be justifiable in charging a candidate with vulgarity or unchastity, and the like, if they are true, there is no reason why they should be privileged, because they do not enter into the determination of the candidate's fitness for office, and only raises a question of preference.

Where the party is holding an office instead of being a candidate for office, the only public interest to be subserved in the establishment of a privilege is the faithful performance of his official duty, and where the office is one, the incumbent of which can only be removed for malfeasance in office, only those communications should be held to be privileged, which criticise his public conduct. If, however, the office is appointive, and the incumbent is removable at the pleasure of the appointive power, the privilege should be as extensive as that which should relate to candidates, as already explained.

The foregoing statement presents what it is conceived should be the law. An investigation of the authorities, however, reveals a different condition of the law. The cases which fall under the subject of this section are naturally, as well as by the variance in the authorities, divided into two classes: *First,* where the office is one of appointment, and the criticism is contained in a petition or address to the appointing or removing power; and, *secondly,* where the office is elective, and the criticisms appear in publications of the press, or are made in speeches at public meetings, and

are intended to influence the votes of the electors at large, who will be called upon to pronounce for or against the candidate. In the cases of the first class, it has been very generally held that the communications are privileged as long as they are *bona fide* statements, and the burden of establishing malice in their utterance is thrown upon the plaintiff. The Supreme Court of New York characterizes a contrary ruling in the court below, as "a decision which violates the most sacred and unquestionable rights of free citizens; rights essential to the very existence of a free government, rights necessarily connected with the relation of constituent and representative, the right of petitioning for a redress of grievances, and the right of remonstrating to the competent authority against the abuse of official functions."1 Not only are these petitions privileged when they are presented, but also when they are being circulated for the purpose of procuring signatures.2

This privilege is not confined to communications, in the form of petitions, which relate to the incompetency, and call for the removal, of public officials. It is applied also to similar cases arising in the management and government of other and private bodies, whether incorporated or unincorporated. Thus all communications to church tribunals in reference to the moral character of its members, both lay and clerical, are protected by this privilege so as not to be actionable, if they were not prompted by malice.3 The same privilege protects a communication to the lodge of some secular organization, preferring charges against a member.1 In all these cases the privilege only extends to the communication or petitions, which are presented to the body or person, in whom the power of appointment and removal is vested, and if a petition is prepared, but never presented to the proper authority, any other publication of it would not be privileged.2

There is apparently no rational difference, so far as the justification of the privilege is concerned, between those cases, in which there is a remonstrance or petition to the body or person having the power of appointment and removal, and the cases of appeal or remonstrance to the general public, pronouncing the candidate for an elective office unfit for the same, either through incompetency or dishonesty, and one would naturally expect such a privilege. The electors, and the public generally, are interested in knowing the character and qualifications of those who apply for their suffrages; and the public welfare, in that regard, is best promoted by a full and free discussion of all those facts and circumstances in the previous life of the candidate, which are calculated to throw light upon his fitness for the office for which he applies. Where the statements respect only the mental qualification of the candidate, it has been held that they are privileged. "Talents and qualifications for office are mere matters of opinion, of which the electors are the only competent judges."3 But where the communication impugns the character of the candidate, it appears that the privilege does not cover the case, and the affirmant makes the statement at his peril, being required by the law to ascertain for himself the truth or falsity of it. And the same rule applies to the deliberations of public meetings, as well as to the statements of an individual. In the leading case on this subject1 the court say: "That electors should have a right to assemble, and freely and openly to examine the fitness and qualifications of candidates for public offices, and communicate their opinions to others, is a position to which I most cordially accede. But there is a wide difference between this privilege and a right irresponsibly to charge a candidate with direct,

specific, and unfounded crimes. It would, in my judgment, be a monstrous doctrine to establish that, when a man becomes a candidate for an elective office, he thereby gives to others a right to accuse him of any imaginable crime with impunity. Candidates have rights as well as electors; and those rights and privileges must be so guarded and protected as to harmonize one with the other. If one hundred or one thousand men, when assembled together, may undertake to charge a man with specific crimes, I see no reason why it should be less criminal than if each one should do it individually at different times and places. All that is required in the one case or the other is, not to transcend the bounds of truth. If a man has committed a crime, any one has a right to charge him with it, and is not responsible for the accusation; and can any one wish for more latitude than this? Can it be claimed as a privilege to accuse *ad libilum* a candidate with the most base and detestable crimes? There is nothing upon the record showing the least foundation or pretense for the charges. The accusation, then, being false, the *prima facie* presumption of law is, that the publication was malicious, and the circumstance of the defendant being associated with others does not *per se* rebut this presumption." This position of the New York court has not only been sustained by later cases in the same State, but it has been followed generally by the other American courts, and it may be considered as the settled doctrine in this country.1

[Back to Table of Contents]

§ 23.

Publications Through The Press.—

It has been often urged in favor of the press, that a general and almost unrestricted privilege should be granted the proprietors of newspapers for all statements that might be received and printed in their paper in good faith, which subsequently prove to be false and injurious to some individual, provided it pertain to a matter in which the public may justly be supposed to be interested. This view has of late met with a strong support in Judge Cooley. In criticising an opinion of the New York court to the contrary,2 he says: "If this strong condemnatory language were confined to the cases in which private character is dragged before the public for detraction and abuse to pander to a depraved appetite for scandal, its propriety and justice and the force of its reasons would be at once conceded. But a very large proportion of what the newspapers spread before the public relates to matters of public concern, in which, nevertheless, individuals figure, and must, therefore, be mentioned in any account or discussion. To a great extent also, the information comes from abroad; the publisher can have no knowledge concerning it, and no inquiries which he could make would be likely to give him more definite information, unless he delays the publication, until it ceases to be of value to his readers. Whatever view the law may take, the public sentiment does not brand the publisher of news as libeler, conspirator or villain, because the telegraphic dispatches transmitted to him from all parts of the world, without any knowledge on his part concerning the facts, are published in his paper, in reliance upon the prudence, care and honesty of those who have charge of the lines of communication, and whose interest it is to be vigilant and truthful. The public demand and expect accounts of every important meeting, of every important trial, and of all the events which have a bearing upon trade and business, or upon political affairs. It is impossible that these shall be given in all cases without matters being mentioned derogatory to individuals; and if the question were a new one in the law, it might be worthy of inquiry whether some lines of distinction could not be drawn which would protect the publisher when giving in good faith such items of news as would be proper, if true, to spread before the public, and which he gives in the regular course of his employment, in pursuance of a public demand, and without any negligence, as they come to him from the usual and egitimate sources, which he has reason to rely upon; at the same time leaving him liable when he makes his columns the vehicle of private gossip, detraction and malice."1 We believe that the law should "protect the publisher when giving in good faith such items of news as would be proper, if true, to spread before the public." But the difficulty is experienced in determining what is proper to be published in an ordinary newspaper. It seems to us that whenever an event occurs in which the public generally is justified in demanding information, the published accounts will be covered by the ordinary privilege which is granted to the injurious and false statements of private individuals, when they are made to those who have a legitimate interest in the subject-matter.1 But there is no reason why any special protection should be thrown around the publisher of news. Any such special protection which cannot in reason be extended to the "village gossiper," would in the

main only serve to protect newspaper publishers in the publication of what is strictly private scandal. Except in one large class of cases, in which we think both the press and the individual are entitled to the protection asked for, viz.: in criticisms upon public officials and candidates for office, the general demand of Judge Cooley may be granted, indeed is now granted by the law which denies "that conductors of the public press are entitled to peculiar indulgences and have special rights and privileges."2 But the demands of the press extend beyond the limits set down by Judge Cooley. The privilege they ask for is intended to furnish protection for all those thrilling accounts of crime and infamous scandal, the publication of which appears to be required by a depraved public taste, but which the thoughtful citizen would rather suppress than give special protection to the publisher. The only two cases in which a change in the existing law of privilege would perhaps be just and advisable, are, *first,* the public criticism of public officials and political candidates, and, *secondly,* the reports of failures or financial embarrassments of commercial personages. In the second case, the privilege is granted to individuals, and even to those well-known mercantile agencies, when they make private reports to their subscribers of the financial standing of some merchant;1 but the privilege does not appear to extend to the publication of such items in the newspapers.2 Recently, laws have been passed in several States, which prohibit the harassment of debtors by the publication of their names as bad debtors; and, in one case, the constitutionality of the law was contested, but unsuccessfully.1 United States statutes also prohibit the writing of "dunning" communications to debtors on postal cards.

The principal inquiry that concerns us in the present connection is, to what extent privileged communications remain so, when they are published through the public press. The privilege does not extend beyond the necessity which justifies its existence. Thus, for example, the law provides for the legal counsellor and advocate a complete immunity from responsibility for anything he says in the conduct of a cause. The privilege rests upon the necessity for absolute freedom of speech, in order to insure the attainment of justice between the parties. A publication of his speech will not aid in the furtherance of justice, and hence it is not privileged. But the law favors the greatest amount of publicity in legal proceedings, it being one of the political tenets prevailing in this country, that such publicity is a strong guaranty of personal liberty, and furthers materially the ends of justice. Hence we find that fair, impartial accounts of legal proceedings, which are not *ex parte* in character, are protected and are recognized as justifiable publications.2 The publication is privileged only when it is made with good motives and for justifiable ends.3 Observations or comments upon the proceedings do not come within the privilege.1 Nor, it seems, do the defamatory speeches come within the privilege thus accorded to the publication of legal proceedings.2 But *ex parte* proceedings, and all preliminary examinations, though judicial in character, do not come within the privilege, and are not protected when published in the newspaper. In one case, the court say: "It is our boast that we are governed by that just and salutary rule upon which security of life and character often depends, that every man is presumed innocent of crimes charged upon him, until he is proved guilty. But the circulation of charges founded on *ex parte* testimony, of statements made, often under excitement, by persons smarting under real or fancied wrongs, may prejudice the public mind, and cause the judgment of conviction to be passed long before the day of trial has arrived. When that day of trial comes, the rule

has been reversed, and the presumption of guilt has been substituted for the presumption of innocence. The chances of a fair and impartial trial are diminished. Suppose the charge to be utterly groundless. If every preliminary *ex parte* complaint, which may be made before a police magistrate, may with entire impunity be published and scattered broadcast over the land, then the character of the innocent, who may be the victim of a conspiracy, or of charges proved afterwards to have arisen entirely from misapprehension, may be cloven down without any malice on the part of the publisher. The refutation of slander, in such cases, generally follows its propagation at distant intervals, and bring often but an imperfect balm to wounds which have become festered, and perhaps incurable. It is not to be denied that occasionally the publication of such proceedings is productive of good, and promotes the ends of justice. But in such cases, the publisher must find his justification, not in privilege, but in the truth of the charges."[1] .

But the English courts have lately shown an inclination to depart from this doctrine, particularly in relation to the publication of police reports. In a late case,[2] Lord Campbell indorses and acts upon the following quotation from an opinion of Lord Denman, expressed before a committee of the House of Lords in 1843: "I have no doubt that (police reports) are extremely useful for the detection of guilt by making facts notorious, and for bringing those facts more correctly to the knowledge of all parties in unraveling the truth. The public, I think, are perfectly aware that those proceedings are *ex parte,* and they become more and more aware of it in proportion to their growing intelligence; they know that such proceedings are only in the course of trial, and they do not form their opinions until the trial is had. Perfect publicity in judicial proceedings is of the highest importance in other points of view, but in its effect upon character, I think it desirable. The statement made in open court will probably find its way to the ears of all in whose good opinion the party assailed feels an interest, probably in an exaggerated form, and the imputation may often rest upon the wrong person; both these evils are prevented by correct reports." The publication of police reports, or of any other preliminary proceedings of a judicial nature, will bring the news to the ears of countless numbers of strangers, who, not knowing the party accused, will not likely be prejudiced in his favor, and certainly would not have heard or have taken any interest in the rumor of the man's guilt, but for the publication. The readers of these reports, who are inclined to receive them in the judicial frame of mind, suggested by Lord Denman, are not numerous, and very few will dismiss from their minds all suspicions against the innocence of the accused when there has been a failure to convict him of the charge. Even when there has been a trial of the defendant, and the jury has brought in a verdict of acquittal, the publication of the proceedings is calculated to do harm to the reputation of the defendant. But the public welfare demands the freest publicity in ordinary legal proceedings, and the interest of the individual must here give way. On the other hand, there is no great need for the publication of the preliminary examinations. In only a few cases can the publication prove of any benefit to the public. The public demand being small, the sacrifice of private interest is not justified.

Not only is the publication of the proceedings of a court of law privileged; but the privilege extends to the publication in professional and religious journals of proceedings had before some judicial body or council, connected with the

professional or religious organization, which the publishing paper represents.1 And so likewise would be privileged the publication of legislative proceedings, and the proceedings of congressional and legislative investigating committees.2

[Back to Table of Contents]

§ 24.

Security To Reputation—Malicious Prosecution.—

Although a prosecution on the charge of some crime may result in a verdict of acquittal, even where the trial would furnish to a judicial mind a complete vindication, by removing all doubts of the innocence of the accused, it will nevertheless leave its mark upon the reputation. Even a groundless acccusation will soil one's reputation. But it is to the interest of the public, as well as it is the right of the individual, that resort should be made to the courts for redress of what one conceives to be a wrong. While a litigious spirit is to be deprecated, since in the institution of legal order the right to self-defense is taken away, except as an immediate preventive of attacks upon person and property, it is not only expedient but just, that when a man believing that he has a just claim against the defendant, or that this person has committed some act which subjects him to a criminal prosecution, sets the machinery of the law in motion, he should not be held responsible for any damage that might be done to the person prosecuted, in the event of his acquittal. The good faith of the prosecutor should shield him from liability. Any other rule would operate to discourage to a dangerous degree the prosecution of law-breakers, and hence it has been recognized as a wise limitation upon the right of security to reputation. But the interests of the public do not require an absolute license in the institution of groundless prosecutions. The protection of privilege is thrown around only those who in good faith commence the prosecution for the purpose of securing a vindication of the law, which they believe to have been violated. Hence we find that the privilege is limited, and, as it is succinctly stated by the authorities, in order that an action for malicious prosecution, in which the prosecutor may be made to suffer in damages, may be sustained, three things must concur: there must be an acquittal of the alleged criminal, the suit must have been instituted without probable cause, and prompted by malice.

A final acquittal is necessary, because a conviction would be conclusive of his guilt. And even where he is convicted in the court below, and a new trial is ordered by the superior court for error, the conviction is held to be conclusive proof of the existence of probable cause.[1] But an acquittal, on the other hand, does not prove the want of probable cause, does not even raise the *prima facie* presumption of a want of probable cause. Probable cause, as defined by the Supreme Court of the United States, is "the existence of such facts and circumstances as would excite belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime, for which he was prosecuted."[2]

The want of probable cause cannot be inferred; it must be proven affirmatively and independently of the presence of actual malice. The plainest proof of actual malice will not support an action for malicious prosecution, if there be probable cause. With probable cause, the right to institute the prosecution is absolute, and the element of malice does not affect it.[3] But when it has been shown that the defendant in the prosecution has been acquitted and that the suit had been instituted without probable

cause, the malice need not be directly and affirmatively proved. It may be inferred from the want of probable cause. The want of probable cause raises the *prima facie* presumption of malice, and throws upon the prosecutor the burden of proving that he was not actuated by malice in the commencement of the prosecution.1 But this presumption may be rebutted by the presentation of facts, which indicate that the prosecutor was actuated solely by the laudable motives of bringing to justice one whom he considers a criminal. The want of probable cause is not inconsistent with perfect good faith. The prosecutor may have been honestly mistaken in the strength of his case. But when a man is about to institute a proceeding which will do irreparable damage to a neighbor's reputation, however it may terminate, it is but natural that he should be required to exercise all reasonable care in ascertaining the legal guilt of the accused. As it was expressed in one case:2 "Every man of common information is presumed to know that it is not safe in matters of importance to trust to the legal opinion of any but recognized lawyers; and no matter is of more legal importance than private reputation and liberty. When a person resorts to the best means in his power for information, it will be such a proof of honesty as will disprove malice and operate as a defense proportionate to his diligence." In order, therefore, that the prosecutor may, where a want of probable cause has been established against him, claim to have acted in good faith and thus screen himself from liability, he must show that he consulted competent legal counsel, and that the prosecution was instituted in reliance upon the opinion of counsel that he had a good cause of action.

[Back to Table of Contents]

§ 25.

Advice Of Counsel, How Far A Defense.—

It is remarkable with what uncertainty the books speak of the manner in which the advice of counsel constitutes a defense to the action for malicious prosecution. Some of the cases hold that it is proof of probable cause;1 some maintain that it disproves malice, in most cases imposing no limitation upon its scope,2 while others, and it is believed the majority of cases, refer to it as establishing both the absence of malice and the presence of a probable cause.3 If the position of these courts is correct, which hold that the advice of counsel establishes the existence of probable cause, then the advice of counsel will constitute an absolute bar to all actions for malicious prosecution, whenever there has been a full and fair disclosure of all the facts within the knowledge of the prosecutor; and the proof of actual malice as the cause of the prosecution will not render him liable, not even where the procurement of professional opinion was to furnish a cloak for his malice, or as a matter of precaution, to learn whether it was safe to commence proceedings. But probable cause does not rest upon the sincerity of the prosecutor's belief, nor upon its reasonableness, as shown by facts which are calculated to influence his judgment peculiarly, and not the judgment of others. It must be established by facts which are likely to induce *any* reasonable man to believe that the accused is guilty. If probable cause depends upon the honest reasonable belief of the prosecutor in the guilt of the accused, it is certainly based upon reasonable grounds, if his legal adviser tells him that he has a good cause of action. But his belief does not enter into the determination of the question of probable cause. Although his honest belief in the guilt of the accused is necessary to shield him from a judgment for malicious prosecution, it is not because such belief is necessary to establish probable cause, but because its absence proves that the prosecution was instituted for the gratification of his malice. The opinion of counsel can not supplant the judgment of the court as to what is probable cause, and such would be the effect of the rule, that the advice of counsel establishes probable cause. As Mr. Justice Story said: "What constitutes a probable cause of action is, when the facts are given, matter of law upon which the court is to decide; and it can not be proper to introduce certificates of counsel to establish what the law is."1

The better opinion, therefore, is that the advice of counsel only furnishes evidence of his good motives, in rebuttal to the inference of malice from want of probable cause. It does not constitute a conclusive presumption of good faith on the part of the prosecutor. If, therefore, there are facts, which establish the existence of malice, and show that the procurement of professional opinion was to cloak his malice, or as a matter of precaution to learn whether it was safe to commence proceedings, the defense will not prevail, and the prosecutor will, notwithstanding, be held liable.1

[Back to Table of Contents]

CHAPTER III.

PERSONAL LIBERTY.

§ 26.

Personal Liberty—How Guaranteed.—

It is altogether needless in this connection to indulge in a panegyric upon the blessings of guaranteed personal liberty. The love of liberty, of freedom from irksome and unlawful restraints, is implanted in every human breast. In the American Declaration of Independence, and in the bills of rights of almost every State Constitution, we find that personal liberty is expressly guaranteed to all men equally. But notwithstanding the existence of these fundamental and constitutional guaranties of personal liberty, the astounding anomaly of the slavery of an entire race in more than one-third of the States of the American Union, during three-fourths of a century of natural existence, gave the lie to their own constitutional declarations, that "*all* men are endowed by their Creator, with certain inalienable rights, among which are the right to life, liberty, and the pursuit of happiness." But, happily, this contradiction is now a thing of the past, and in accordance with the provisions of the thirteenth amendment to the Constitution of the United States, it is now the fundamental and practically unchangeable law of the land, that "neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.[1]

But to a practical understanding of the effect of these constitutional guaranties, a clear idea of what personal liberty consists is necessary. It is not to be confounded with a license to do what one pleases. Liberty, according to Montesquieu, consists "only in the power of doing what we ought to will, and in not being constrained to do what we ought not to will." No man has a right to make such a use of his liberty as to commit an injury to the rights of others. His liberty is controlled by the oft-quoted maxim, *sic utere tuo, ut alienum non lædas.* Indeed liberty is that amount of personal freedom, which is consistent with a strict obedience to this rule. "Liberty," in the words of Mr. Webster, "is the creature of law, essentially different from that authorized licentiousness that trespasses on right. It is a legal and refined idea, the offspring of high civilization, which the savage never understood, and never can understand. Liberty exists in proportion to wholesome restraint; the more restraint on others to keep off from us, the more liberty we have. It is an error to suppose that liberty consists in a paucity of laws. If one wants few laws, let him go to Turkey. The Turk enjoys that blessing. The working of our complex system, full of checks on legislative, executive and judicial power, is favorable to liberty and justice. Those checks and restraints are so many safeguards set around individual rights and interests. That man is free who is protected from injury."[1] While liberty does not consist in the paucity of laws, still it is only consistent with a limitation of the

restrictive laws to those which exercise a wholesome restraint. “That man is free who is protected from injury,” and his protection involves necessarily the restraint of other individuals from the commission of the injury. In the proper balancing of the contending interests of individuals, personal liberty is secured and developed; any further restraint is unwholesome and subversive of liberty. As Herbert Spencer has expressed it, “every man may claim the fullest liberty to exercise his faculties compatible with the possession of like liberty by every other man.”1

The constitutional guaranties are generally unqualified, and a strict construction of them would prohibit all limitations upon liberty, if any other meaning but the limited one here presented were given to the word. But these guaranties are to be liberally construed, so that the object of them may be fully attained. They do not prohibit the exercise of police power in restraint of licentious trespass upon the rights of others, but the restrictive measures must be kept within these limits. “Powers, which can be justified only on this specific ground (that they are police regulations), and which would otherwise be clearly prohibited by the constitution, can be such only as are so clearly necessary to the safety, comfort and well-being of society, or so imperatively required by the public necessity, as to lead to the rational and satisfactory conclusion that the framers of the constitution could not, as men of ordinary prudence and foresight, have intended to prohibit their exercise in the particular case, notwithstanding the language of the prohibition would otherwise include it.”2

The restrictions upon personal liberty, permissible under these constitutional limitations, are either of a public or private nature. In consequence of the mental and physical disabilities of certain classes, in the law of domestic relations, their liberty is more or less subjected to restraint, the motive being their own benefit. The restraints are of a private nature, imposed under the law by private persons who stand in domestic relation to those whose liberty is restrained. This subject will be discussed in a subsequent connection.1 In this connection we are only concerned with those restraints which are of a public nature, *i. e.,* those which are imposed by government. They may be subdivided under the following headings: 1. The police control of the criminal classes. 2. The police control of dangerous classes, other than by criminal prosecutions. 3. The regulation of domicile and citizenship. 4. Police control of morality and religion. 5. Police regulation of the freedom of speech and of the press. 6. Police regulation of trades and professions.

[Back to Table of Contents]

CHAPTER IV.

GOVERNMENT CONTROL OF CRIMINAL CLASSES.

[Back to Table of Contents]

§ 27.

The Effect Of Crime On The Rights Of The Criminal—Power Of State To Declare What Is A Crime.—

The commission of crime, in the discretion of the government, subjects all rights of the criminal to the possibility of forfeiture. Life, liberty, political rights, statutory rights, relative rights, all or any of them may be forfeited to the State, in punishment of a crime. When a man commits a crime he forfeits to a greater or less extent his right of immunity from harm. The forfeiture for crime is usually confined to life, liberty and property, and political rights, although all rights in the wisdom of the legislature may be subjected to forfeiture, and the forfeiture of liberty is the most common.

But, in order that there may be a constitutional forfeiture of any right, as a punishment for the doing of an act, that act must be one which the State may condemn and punish as a crime. The power of the State to declare what is a crime, and punishable as such, is not unlimited. We need not dwell upon Blackstone's distinction between *mala in se* and *mala prohibita,* for that distinction is neither scientific nor safe as a guide in this case. On the one hand, it is an undoubted principle of constitutional law that an act innocent or innocuous *per se* cannot be prohibited and punished as a crime. And, on the other hand, that the State may enlarge the category of existing crimes, by the prohibition and punishment as crimes of acts, which at common law and under existing statutes were permitted to be done, subject to no penalty, civil or criminal, or which were not punishable as crimes.

This principle of constitutional law has recently been discussed and applied, in a case[1] in which the constitutionality of a New York statute was questioned, which statute made it a criminal misdemeanor to be found in possession of the means of violating a law, and authorized the peremptory destruction of such means by any constable or peace officer.[2] In holding the act to be constitutional, the Court of Appeals said, *inter alia:* "The legislature may not declare that to be a crime which in its nature is and must be under all circumstances innocent, nor can it in defining crimes, or in declaring their punishment, take away or impair any inalienable right secured by the constitution. But it may, acting within these limits (express limitations of constitutions, State and Federal) make acts criminal which before were innocent, and ordain punishments in future cases where before none could have been inflicted. This, in its nature, is a legislative power, which by the constitution of the State, is committed to the discretion of the legislative body. The act in question declares that nets set in certain waters are public nuisances, and authorize their summary destruction. The statute declares and defines a new species of public nuisance, not known to the common law, nor declared to be such by any prior statute. But we know of no limitation of legislative power which precludes the legislature from enlarging the category of public nuisances, or from declaring places or property used to the detriment of public interests or to the injury of the health, morals or welfare of the

community, public nuisances, although not such at common law. There are, of course, limitations upon the exercise of this power. The legislature cannot use it as a cover for withdrawing property from the protection of the law, or arbitrarily, where no public right or interest is involved, declare property a nuisance for the purpose of devoting it to destruction. If the court can judicially see that the statute is a mere evasion, or was framed for the purpose of individual oppression, it will set it aside as unconstitutional, but not otherwise."

A similar question, as to the power of the State to create new crimes by statute, was raised in respect to a California statute, which declared a husband guilty of a felony who "connives at, consents to, or permits," his wife to be placed or left in a house of prostitution. The statute was held to be constitutional, notwithstanding the statutory crime there created was a mere operation of the mind, not evidenced by any overt act.1 It has also been held to be a constitutional exercise of police power to make it criminal for any person doing business as a banker to receive deposits after he knows that the bank is insolvent.2

There are, however, some express constitutional limitations upon the power of the State to declare that a crime, which may be held to create a civil liability. Thus, many of the State constitutions contain an express prohibition of imprisonment for debt. Difficulty is experienced in determining, when this constitutional provision is infringed, in those cases where the element of fraud enters into the case. The cases seem, generally, to agree that this constitutional protection from liability to imprisonment is intended solely for the honest but unsuccessful debtor, and cannot be invoked in behalf of the dishonest or fraudulent debtor. For example, in applying this question of constitutionality to the statutes, now very common, which provide for the punishment of hotel guests who fraudulently and with intent to cheat, refuse to pay their bills, a distinction is made by the courts between the honest and the fraudulent failures to pay such bills; holding that the statutes are only intended to punish those who willfully and fraudulently contract such bills, and hence do not come within the constitutional prohibition of imprisonment for debt.1

On the same general principle, it has been held that imprisonment, for refusal to obey the order of court, in bastardy proceedings, to pay an allowance to the mother of the child,2 or to pay over to another money which is in one's possession, but under the control of the court,3 does not fall within the constitutional prohibition of imprisonment for debt. It has also been held to be constitutional for a city ordinance to provide imprisonment for employees of a water company, as a penalty for their violation of the contract between the city and the water company.1 On the other hand, it has been held to be a violation of the constitutional prohibition of imprisonment for debt, where a statute provides for the punishment by fine, and by imprisonment if he fails to pay the fine, of a banker who receives deposits after he knows himself to be in an insolvent condition.2 And it has, likewise, been held that a statute is unconstitutional which directs the imprisonment of a debtor who has disposed of all his property, with the intent to defraud his creditors.3 On the other hand, it has been held to be constitutional for a statute to provide for the arrest of debtors, who are removing and disposing of their property in fraud of creditors.4

[Back to Table of Contents]

§ 28.

Due Process Of Law.—

But the forfeiture of rights is limited and controlled by constitutional restrictions, and it may be stated as a general proposition, that such a forfeiture, as a punishment for crime, can only be effected after a judicial examination and a conviction of the crime charged. In the Magna Charta, in the charter of Henry III., in the Petition of Right, in the Bill of Rights, in England, and in this country in all the constitutions, both State and national, it is substantially provided that no man shall be deprived of his life, liberty, or property, unless by the judgment of his peers or the law of the land. In some State constitutions, the clause "without due process of law" is employed in the place of "the judgment of his peers or the law of the land;" but the practical effect is the same in all cases, whatever may be the exact phraseology of this constitutional provision.5 Perhaps the scope of the limitation cannot be better explained than by the words of Mr. Webster: "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not therefore to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees and forfeitures in all possible forms, would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void. It would tend directly to establish the union of all powers in the legislature. There would be no general permanent law for courts to administer or men to live under. The administration of justice would be an empty form, an idle ceremony. Judges would sit to execute legislative judgments and decrees, not to declare the law or administer the justice of the country."1

[Back to Table of Contents]

§ 29.

Bills Of Attainder.—

A further limitation is imposed by the constitution of the United States, which prohibits the enactment of *bills of attainder* by Congress and by the legislatures of the several States.2 A bill of attainder is a legislative conviction for crime, operating against a particular individual, or some one or more classes of individuals. According to the ancient English meaning of the term, it included only those legislative enactments, which pronounced the judgment of death. But a broader signification is given to the word in this constitutional limitation, and it includes all attempts on the part of Congress to inflict punishment and penalties upon individuals for alleged crimes of every description. The term *bill of attainder* is now used to include all bills of pains and penalties. "I think it will be found that the following comprise those essential elements of bills of attainder, in addition to the one already mentioned (which was that certain persons were declared attainted and their inheritable blood corrupted), which distinguish them from other legislation, and which made them so obnoxious to the statesmen who organized our government: 1. They were convictions and sentences pronounced by the legislative department of the government, instead of the judicial. 2. The sentence pronounced and the punishment inflicted were determined by no previous law or fixed rule. The investigation into the guilt of the accused, if any such were made, was not necessarily or generally conducted in his presence or that of his counsel, and no recognized rule of evidence governed the inquiry."1

Since the formation of the Union, there has happily been but one occasion when there was any inducement to the enactment of such legislative judgments and convictions, and that was at the close of the late civil war. Congress provided by statute that in order that one may enter upon the performance of the duties of any office of trust or profit under the government of the United States, excepting the President of the United States, he shall theretofore take and subscribe an oath that he had not aided or given countenance to the rebellion against the United States. A second act was passed, prescribing a similar oath to be taken by candidates for admission to practice in any of the courts of the United States. The Supreme Court held that the latter statute was void, because it offended this constitutional provision, prohibiting the enactment of bills of attainder.1 Inasmuch as the right to hold a public office is a privilege and not a right, the former act of Congress, which provided the so-called "iron-clad" oath of office, would not be unconstitutional, unless the qualifications of the candidates for office, to which the statute applied, are stipulated in the constitution. Congress, or a legislature, has no power to change the qualifications for office, where they have already been determined by the constitution.2 It is, probably, for this reason that the office of President was excluded from the operation of this statute. In article I., section 1, of the constitution of the United States, the oath of office is prescribed which the President is required to take before entering upon the duties of his office.

Similar legislation was enacted in some of the States. In Missouri, the constitution of ’65 contained a clause, which required a similar oath to be taken by all voters, officers of State, county, town, or city, to be elected or already elected; attorneys at law, in order to practice law; clergymen, in order to teach, and preach or solemnize marriages; professors and teachers of educational institutions, etc. Although the State court, as it was then constituted, did not hesitate to pronounce these provisions valid, the Supreme Court of the United States has declared them void as being in violation of the national constitution, which prohibits the enactment of bills of attainder by the States.3

Coming under the head of bills of attainder, the New York statute (Laws of 1893, ch. 661, as amended by Laws of 1895, ch. 398) might be cited, which makes it a misdemeanor for any one to practice medicine, who has been convicted of a felony, where the statute is made to apply to persons who were convicted before it became a law. In a case, conveying these facts, the statute was declared to be unconstitutional because it was *ex post facto.*1

[Back to Table of Contents]

§ 30.

Ex Post Facto Laws.—

Another constitutional provision, intended to furnish to individual liberty ample protection against the exercise of arbitrary power, prohibits the enactment of *ex post facto* laws by Congress as well as by the State legislatures.2 The literal meaning of the prohibition is that no law can be passed which will apply to and change the legal character of an act already done. But at a very early day in the history of the constitution, the clause was given a more technical and narrow construction, which has ever since limited the application of the provision. In the leading case,3 Judge Chase explains the meaning of the term *ex post facto* in the following language: "The prohibition in the letter is not to pass any law concerning or after the fact; but the plain and obvious meaning and intention of the prohibition is this: that the legislatures of the several States shall not pass laws after a fact done by a subject or citizen, which shall have relation to such fact, and punish him for having done it. The prohibition, considered in this light, is an additional bulwark in favor of the personal security of the subject, to protect his person from punishment by legislative acts having a retrospective operation. I do not think it was inserted to secure the citizen in his private rights of either property or contracts. The prohibitions not to make anything but gold and silver a tender in payment of debts, and not to pass any law impairing the obligation of contracts, were inserted to secure private rights; but the restriction not to pass any *ex post facto* law was to secure the person of the subject from injury or punishment, in consequence of such law. If the prohibition against making *ex post facto* laws was intended to secure personal rights from being affected or injured by such laws, and the prohibition is sufficiently extensive for that object, the other restraints I have enumerated were unnecessary, and therefore improper, for both of them are retrospective.

"I will state what laws I consider *ex post facto* laws, within the words and the intent of the prohibition. 1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal, and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed. 4th. Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender. All these and similar laws are manifestly unjust and oppressive. In my opinion, the true distinction is between *ex post facto* laws and retrospective laws. Every *ex post facto* law must necessarily be retrospective, but every retrospective law is not an *ex post facto* law; the former only are prohibited. Every law that takes away or impairs rights vested, agreeably to existing laws, is retrospective, and is generally unjust, and may be oppressive; and there is a good general rule, that a law should have no retrospect; but there are cases in which laws may justly, and for the benefit of the community, and also of individuals, relate to a time antecedent to their commencement; as statutes of

oblivion or of pardon. They are certainly retrospective, and literally both concerning and after the facts committed. But I do not consider any law *ex post facto,* within the prohibition that mollifies the rigor of the criminal law; but only those that create or aggravate the crime, or increase the punishment, or change the rules of evidence for the purpose of conviction. Every law that is to have an operation before the making thereof, as to commence at an antecedent time, or to save time from the statute of limitations, or to excuse acts which were unlawful, and before committed, and the like, is retrospective. But such laws may be proper or necessary, as the case may be. There is a great and apparent difference between making an unlawful act lawful, and the making an innocent action criminal, and punishing it as a crime. The expressions *ex post facto* are technical; they had been in use long before the revolution, and had acquired an appropriate meaning by legislators, lawyers and authors."1 It is not difficult to understand the scope of the cosntitutional protection against *ex post facto* laws, except as to those cases, in which it is held that when a less punishment is inflicted the law is not *ex post facto.* The difficulty in these cases is a practical one, arising from an uncertainty concerning the relative grievousness and weight of different kinds of punishment. That a law is constitutional, which mitigates the punishment of crimes already committed, cannot be doubted.1 But all punishments are degrading, and in no case of an actual change of punishment, as for example from imprisonment to whipping, or *vice versa,* can the court with certainty say that the change works a mitigation of the punishment. But while the courts of many of the States have undertaken to decide this question of fact,2 the New York Court of Appeals has held that "a law changing the punishment for offenses committed before its passage is *ex post facto* and void, under the constitution, unless the change consists in the remission of some separable part of the punishment before prescribed, or is referable to prison discipline or penal administration, as its primary object."3 Except in regard to the material changes in the rules of evidence which tend to make conviction easier, laws for the regulation of criminal procedure are always subject to repeal or amendment, and the new law will govern all prosecutions that are begun or are in progress after its enactment, it matters not when the offenses were committed. Such a law is not deemed an *ex post facto* law when applied to the prosecution of offenses committed before the change in the law.1

The principle involved in the prohibition of *ex post facto* laws, is also applicable to the rights and privileges of the convict in the penitentiary, wherever the new law tends to increase the hardship of the imprisonment.1 But a law is not *ex post facto* which mitigates these hardships, or which shortens the term of imprisonment under the so-called "merit" rule. Thus, it was held to be constitutional to provide for the reduction in the length of terms of imprisonment, on account of good behavior, according to a prescribed scale, but providing for less favorable consideration to those who were serving a second term. The fact that one, who had served a term prior to the enactment of the law, was discriminated against, did not make it an *ex post facto* law.2 Nor is it a case of *ex post facto* law when, under the so-called Habitual Criminals Acts, a heavier penalty is imposed for the second or third offense, where the first offense was committed and the penalty therefor inflicted and suffered, before this law was passed.3

[Back to Table of Contents]

§ 31.

Cruel And Unusual Punishment In Forfeiture Of Personal Liberty And Rights Of Property.—

In preceding sections4 it has been explained how far the constitutional prohibition of cruel and unusual punishments control the power of the State to inflict capital and corporal punishment. Punishments, which do not restrict or interfere with one's right of personal security, must involve the deprivation or restriction of one's personal liberty or right of property, or of one's civil rights. That any one of these rights may be taken away or restricted, as a punishment for crime, seems never to have been questioned except in one case,1 where the right of suffrage and the right to hold office, were taken away, as a penalty for gambling in violation of the laws of the State. But these were held not to be cruel and unusual punishments in the constitutional sense.

In recent decisions this constitutional provision has been invoked in resistance to the imposition of a new penalty for crime; rather, on the ground that the penalty was excessive in degree when the character of the offense was considered, than that it was inherently cruel and unusual. In all such cases, the new statute increased the severity of the punishment, and in all of them the courts held that the new penalties were not excessive or cruel in the constitutional sense.2 In other cases, this constitutional provision was appealed to as making a statute unconstitutional, which applied ordinary punishments,—fines and imprisonment—to actions, which have been made crimes by statute; in one case, the maintenance of a common nuisance,3 and in another, the killing of wild game in violation of the regulations of the game laws.4 The courts have held that these were not cruel and unusual punishments in the constitutional sense.

A statute has, likewise, been held to be lawful, and free from constitutional objection, which provided that the receiver of stolen goods may be sentenced to the State penitentiary for a term not exceeding five years, or to the county jail for a term not exceeding six months, *or both.* Double punishment is not cruel or unusual.1

[Back to Table of Contents]

§ 32.

Preliminary Confinement To Answer For A Crime—Commitment Of Witnesses.—

It is the benign principle of every system of jurisprudence that one is presumed to be innocent of all criminal accusations, until he is proven to be guilty, and that presumption is so strong that the burden is thrown upon the prosecution of proving the guilt beyond the shadow of a doubt, in order to secure a conviction. But, notwithstanding this general presumption of innocence, the successful prosecution and punishment of crimes require that the necessary precautions be taken to secure the presence of the accused during the trial and afterwards, in case of conviction, and the fear of a default in attendance becomes greater in porportion as the likelihood of conviction increases. In order, therefore, that the laws may be enforced, and the guilty be brought to trial and punishment, it is necessary that every one, against whom a charge of crime has been laid, should submit to arrest by the proper officer, whose duty it is to bring the accused before the court or officer by whom the order for arrest has been issued.

Another phase of preliminary confinement, which is permitted in the furtherance of justice, is the commitment of witnesses in criminal cases. When a witness is summoned in a criminal case, whether to appear before the grand jury, or in the actual trial of the case, and he refuses to testify, he may be committed to jail for contempt, unless he is exempted by privilege from the obligation to testify.2 So, also, where it is feared that a witness is likely to disappear before the trial, in order to escape his appearance on the witness stand, he may be required to enter into recognizance and give bond for his appearance; and if he refuses or is unable to do so, he may be committed to jail. There is no unconstitutional interference with personal liberty in such a commitment.1

Since the preliminary confinement is ordered only to insure the attendance of the accused at the trial, the confinement can only be continued as long as there is any reasonable danger of his default. Where, therefore, the punishment upon conviction will not exceed a fine or imprisonment of short duration, it became customary at an early day to release him upon giving a bond for his appearance, signed by sureties, in the sum which he will have to pay upon conviction, or in such a sum as would probably be sufficient to outweigh the impulse to flee from the threatened imprisonment. This was called *giving bail.* At common law, bail could not be demanded as a matter of right, except in cases of misdemeanor, and felonies were not bailable as a rule. But the severity of the common law in this regard has been greatly moderated, until at the present day, as a general rule, all offenses are bailable as a matter of course, except in cases of homicide and other capital cases. In all capital cases, it is usually provided that bail should be refused, where the evidence of guilt is strong or the presumption great, and in all such cases it is left to the discretion of the judge to whom application is made, whether bail should be granted or refused.2 When

a person is bailed, he is released from the custody of the State authorities, but he is not remanded completely to his liberty. The one who has furnished the security, and is therefore responsible for his default, has in theory the custody of the accused in the place of the State, and he has in fact so much of a control over the accused, that he may re-arrest the latter, whenever he wishes to terminate his responsibility, and deliver the principal to the officers of the law. But the imprisonment by the bail can only be temporary and for the purpose of returning him to the custody of the law, and must be done with as little violence as possible. This can be done at any time before the forfeiture of the bond for non-appearance has been judicially declared; it may be done by the bail or by his duly constituted agent, and the arrest can be made wherever the accused can be found, even though it is without the State.1

Another instance, where bail is permitted to be allowed, in the discretion of the judge, is after conviction for a crime, which is not punishable by death, pending an appeal. But the circumstances, and conditions, under which bail will be allowable in such a case, are wholly within the control and discretion of the legislature; and the statute, regulating the same, cannot be successfully attacked, on the ground of unconstitutionality, because the statute permits bail only when there is a stay of proceedings, and a certificate is procured from a judge that there is reasonable doubt, whether the judgment should stand.2

In Pennsylvania, a statute requires bail absolute to be given for a debt and costs, where, in a suit before a magistrate for the recovery of wages for manual labor, an appeal is taken from the judgment in favor of the plaintiff. The act was held to be free from constitutional objections.3

The constitutions of most of the States, as well as the constitution of the United States, provide that excessive bail shall not be required. What constitutes excessive bail, must from the necessities of the case be left with the discretion of the judge or magistrate, to whom application for release on bail is made. Any misjudgment in such a case, or a willful requirement of excessive bail, could not be remedied, except by application to some other court or judge possessing jurisdiction over the case. That bail may be called reasonable, which will be sufficient to secure the attendance of the accused at the trial by outweighing or overcoming the inducement to avoid punishment by a default; and the court or judge, in determining the amount of the bail, must take into consideration all the circumstances which will increase or diminish the probability of a default, the nature of the offense, and of the punishment, the strength or weakness of the evidence, the wealth or impecuniosity of the accused, etc.

[Back to Table of Contents]

§ 33.

What Constitutes A Lawful Arrest.—

As a general proposition, no one can make a lawful arrest for a crime, except an officer who has a warrant issued by a court or magistrate having the competent authority. If the process is fair on its face, that is, nothing appears upon its face to lead the officer to an inquiry into the jurisdiction of the court, then the officer who makes the arrest has acted lawfully, notwithstanding the court or magistrate which issued the process had no jurisdiction over the case.1

A distinction is made by the cases between courts of general and of inferior jurisdiction, in respect to what process is fair on its face. If the process issued from a court of general jurisdiction, the officer is allowed to indulge in the presumption that the case came within the jurisdiction of the court, and need make no inquiry into the details of the case, nor need the warrant contain recitals to show that the court had jurisdiction. But if the process issued from a magistrate or court of inferior and limited jurisdiction, the warrant must contain sufficient recitals to satisfy the officer that the case was within the jurisdiction of the court, in order to be fair on its face. This distinction is very generally recognized and applied.1

The question has been raised, whether an arrest, made, under a warrant lawfully issued by a State court or magistrate, is made unlawful, as not being due process of law, by the fact that the person arrested has been unlawfully brought by private persons within the jurisdiction of the court. It has been held that the two occurrences are distinct and separate, and that the arrest under a State warrant was "due process of law."2

The officer is bound to know whether under the law the warrant is defective, and not fair on its face, and he is liable as a trespasser, if it does not appear on its face to be a lawful warrant. His ignorance is no excuse.1 It has been held in several of the States2 that where an officer has knowledge of the illegality of the warrant, although it is fair on its face, he can not with safety act under it, the protection of process fair on its face being granted to those who ignorantly rely upon its apparent validity. But the better opinion is that the officer is not required in any case to pass judgment upon the validity of a warrant that is fair on its face, and his knowledge of extra-judicial facts will not deprive him of the right to rely upon its apparent validity.3

[Back to Table of Contents]

§ 34.

Arrests Without A Warrant.—

Although it is the general rule of law that there can be no arrest without a warrant of the nature just described, yet there are cases in which the requirement of a warrant would so obstruct the effectual enforcement of the laws, that the ends of justice would be defeated. For public reasons, therefore, in a few cases, the personal security of the citizen is subjected to the further liability of being arrested by a police officer or private individual without a warrant. But the right thus to arrest without a warrant must be confined to the cases of strict public necessity. The cases are few in number and may be stated as follows:—

1. When a felony is being committed, an arrest may be made without warrant to prevent any further violation of the law.1

2. When the felony has been committed, and the officer or private individual is justified, by the facts within his knowledge, in believing that the person arrested has committed the crime.2

3. All breaches of the peace, in assaults and batteries, affrays, riots, etc., for the purpose of restoring order immediately.3

4. The arrest of all disorderly and other persons who may be violating the ordinary police regulations for the preservation of public order and health, such as vagrants, gamblers, beggars, who are found violating the laws in the public thoroughfares.4

The constitutional principle, that arrest without warrant is permissible only in cases of strict public necessity, is very clearly set forth in a case from the Michigan courts, which pronounces a statute of that State unconstitutional, in that it authorizes the recaption without warrant and imprisonment of a convict, who is charged with the violation of the conditions of his pardon. No public necessity required this summary arrest without warrant; and, consequently, his deprivation of liberty had not been procured by "due process of law."1

[Back to Table of Contents]

§ 35.

The Trial Of The Accused.—

"No man shall be deprived of his life, liberty, or property except by the judgment of his peers or the law of the land." One who has committed a crime can be punished by man, not because he has violated the law of God, or the law of nature (if the two systems of law can be considered distinguishable), but because he has broken the law of man. In order that a man may be lawfully deprived of his life or liberty, he must be convicted of a breach of the human laws, and the conviction must be secured according to the provisions of these laws. If, according to the existing rules of the substantial and remedial law, one charged with a crime is not guilty or cannot be convicted of it, he stands free before the law notwithstanding he has violated the God-given rights of others; and to take away his life or his liberty would be as much an infringement of his constitutional rights, as would a like deprivation be of a man who leads a strictly moral life, and scrupulously respects the natural rights of his fellow-men. A man's life, liberty, or property cannot be taken away, except by due process of law. It is not proposed to explain all the rules of law governing the conduct and management of criminal prosecutions, since the object of the present outline of the subject is simply to make a statement of the leading constitutional protections to personal liberty. The trial must be conducted in complete accordance with the rules of practice and the law of evidence, in order that a conviction may lawfully support an imprisonment for crime. But these rules of practice and pleading may be changed by the legislature to any extent, provided the constitutional limitations to be presently mentioned are not violated.

As already explained, a temporary confinement of one accused of crime is permissible, in fact necessary, for the purpose of insuring the presence of the alleged criminal at the trial; for in cases of felony no one can be tried and convicted in his absence, even though his absence is voluntary.[1] But this confinement is only temporary, and can justifiably continue only for as long a time as is reasonably required by the prosecuting attorney to prepare the case of the State for trial.

[Back to Table of Contents]

§ 36.

The Trial Must Be Speedy.—

It is, therefore, one of the constitutional limitations for the protection of personal liberty, that the trial be speedy. A man accused of a crime is entitled to a speedy trial, not merely because he is under a personal restraint, but also because his reputation is under a cloud, as long as the criminal accusation remains undisposed of. As a general proposition, the accused is entitled to a trial at the next term of the court after the commission of the crime, or after the accused has been apprehended; and if it should prove to be necessary for any cause, except the fault of the accused, to adjourn the court without bringing the prisoner to trial, in ordinary cases he would then be entitled to bail, although originally he was not. This is, however, largely a matter of discretion for the court.1 When the prisoner is ready for trial, the solicitor for the State is not entitled to delay, unless he satisfies the court that he has exercised due diligence, yet, for some cause, the shortness of time or the absence of material witnesses, etc., he is not prepared to proceed to trial.2 The continuance of cases must necessarily be largely left to the discretion and good faith of the prosecuting attorney, although it is the duty of the court to be watchful in behalf of the prisoners, who may through the carelessness or malice of the attorney for the State be kept in prison indefinitely awaiting a trial. The discretionary character of the duties of prosecuting attorneys furnishes them with powerful means of oppression, if they choose to employ them, and they are too often careless and indifferent to the suffering they cause to the accused, and too frequently ignore his legal right to a speedy trial.1

[Back to Table of Contents]

§ 37.

Trials Must Be Public.—

The next constitutional requirement is that the trial must be public. The object of this provision is to prevent the establishment of secret tribunals of justice, which can be made effective instruments for the oppression of the people. But there is a difficulty in determining what amount of publicity in criminal trials would satisfy this requirement of the constitution. It would not do to say that every person has a constitutional right to attend every criminal trial, whether he had an interest in the prosecution or not, for that would necessitate the construction for judicial purposes of a much larger building than is really needed for the ordinary conduct of the courts. Then, too, since this constitutional requirement was established for the protection of the accused, it would not be violating any rights of his, if the courts should be closed, in the trial of causes in which great moral turpitude is displayed, to those who are drawn thither by no real interest in the prosecution or the accused, or for the performance of a public duty, but merely for the gratification of a prurient curiosity. The admission of such persons may justly be considered injurious to the public morals, and not at all required as a protection against the oppression of star chambers. But, while it is undoubtedly true that this constitutional requirement could be satisfied, notwithstanding the public generally is excluded from attendance upon trials, where on account of the nature of the case public morals would likely be corrupted by an unnecessary exposure of human depravity, still it must be conceded that the present public sentiment in America is opposed to any exclusion of the public from attendance upon the sessions of the criminal courts, and an attempt of that kind, even if the court possessed the power under the constitution and laws, and that seems questionable, would raise a most dangerous storm of public indignation against the offending judge. It is only through the action of the legislature that it would be possible to impose effectively the limitations proposed. In framing these limitations, numerous difficulties would present themselves; and it would finally be ascertained that but two methods were feasible, viz.: either to leave it to the discretion of the court who shall be admitted to witness the trial, or to exclude the public altogether, and admit only the officers of the court, including members of the bar and jurors, the parties to the suit, witnesses, and others who are personally interested in the accused or the subject of the suit, and those whose presence is requested by the parties to the cause. Such is believed to be the law prevailing in Germany.[1] Such a provision would seem to make the trial sufficiently public in order to protect the individual against unjust and tyrannical prosecutions, and likewise furnish the community with abundant means for enforcing a proper administration of the courts.

In the same connection, it would be well, in carrying out the same object, to exclude the reporters of the ordinary newspapers. While, as a matter of course, the preservation and publication of criminal trials and statistics are necessary to the public good, it is not only unnecessary as a protection of personal liberty, that they should appear in the ordinary public print, but it is highly injurious to the public morals, as

well as revolting to the sensibilities of any one possessing a fair degree of refinement. The most enterprising of the American journals of the larger cities present daily to their reading public a full history of the criminal doings of the previous day, and the length of the reports increases with the nastiness of the details. The amount of moral filth, that is published in the form of reports of judicial proceedings, renders the daily paper unfit to be brought into a household of youths and maidens. There is greater danger of the corruption of the public morals through the publication of the proceedings of our criminal courts, than through the permission of attendance upon the sessions of the court. Only a few will or can avail themselves of that privilege, whereas thousands get to learn through the press of the disgusting details of crime.

[Back to Table of Contents]

§ 38.

Accused Entitled To Counsel.—

The State, in all criminal prosecutions, is represented by a solicitor, learned in the law, and unless the accused was likewise represented by legal counsel, he would usually be at the mercy of the court and of the prosecuting attorney. The prosecution might very easily be converted into a persecution. It was one of the most horrible features of the early common law of England, that persons accused of felonies were denied the right of counsel, the very cases in which the aid of counsel was most needed; and it was not until the present century that in England the right of counsel was guaranteed to all persons charged with crime.1 But in America the constitutional guaranty of the right of counsel in all cases, both criminal and civil, is universal, and this has been the practice back to an early day. Not only is it provided that prisoners are entitled to counsel of their own appointment, but it is now within the power of any judge of a criminal court, and in most States it is held to be his imperative duty, to appoint counsel to defend those who are too poor to employ counsel; and no attorney can refuse to act in that capacity, although he may be excused by the court on the presentation of sufficient reasons.1

On the continent of Europe, the prisoner is allowed the aid of counsel during the trial, but until the prosecuting attorney is through with his inquisitorial investigation of the prisoner, and has, by alternately threatening, coaxing, and entrapping the accused into damaging admissions, procured all the attainable evidence for the State, he is denied the privilege of counsel. The counsel gains access to his client when the prosecuting attorney is satisfied that he can get nothing more out of the poor prisoner, who finding himself perhaps for the first time in the clutches of the law, and unable to act or to speak rationally of the charge against him, will make his innocence appear to be a crime. Not so with the English and American law. From the very apprehension of the prisoner, he is entitled to the aid of counsel, and while his admissions, freely and voluntarily made, are proper evidence to establish the charge against him, it is made the duty of all the officers of the law, with whom he may come into contact, to inform him that he need not under any circumstances say anything that might criminate him. Confessions of the accused, procured by promises or threats, are not legal testimony, and cannot be introduced in support of the case for the State.1

[Back to Table of Contents]

§ 39.

Indictment By Grand Jury Or By Information.—

The prevailing criminal procedure, throughout the United States, with perhaps a few exceptions, provides in cases of felony for accusations to be made by an indictment by a grand jury.2 But these are matters of criminal procedure that are subject to constant change by the legislature, and it cannot be doubted that no constitutional limitation would be violated, if the grand jury system were abolished.3 So, also, the form of the indictment may be very minutely regulated by statute, without infringing any constitutional provision.4

[Back to Table of Contents]

§ 40.

The Plea Of Defendant.—

According to the early common law, it was thought that before the trial could proceed, the defendant had to plead to the indictment. In treason, petit felony, and misdemeanors, a refusal to plead or standing mute, was equivalent to a plea of guilty and the sentence was pronounced as if the prisoner had been regularly convicted. But in all other cases, it was necessary to have a plea entered, before judgment could be pronounced; and unless the defendant could be compelled to plead, the prosecution would fail. It was the custom in such cases to resort to tortures of the most horrible kind in order to compel the defendant to plead; and where the refusal was shown to be through obstinacy or a design to frustrate the ends of justice, and not because of some physical or mental infirmity (and these matters were determined by a jury summoned for that purpose), the court would pronounce the terrible sentence of "*peine forte et dure.*"1 But at the present day the necessity of a voluntary plea to the indictment does not seem to be considered so pressing, as to require the application of this horrible penalty. Respect for the common law requirement is manifested only by the court ordering the plea of *not guilty* to be entered, whenever the prisoner failed or refused to plead, and the trial then proceeds to the end as if he had voluntarily pleaded.

If upon arraignment, the prisoner should plead guilty, it would appear, from a superficial consideration of the matter, that no further proof need be required. But, strange as it may seem, there have been cases in which the accused has pleaded guilty, and it has afterwards been discovered that no crime had been committed. A tender regard for the liberty of the individual would suggest the requirement of extraneous evidence to prove the commission of a crime, and the plea of guilty be admittted only to connect the prisoner with the crime. This would be sufficient precaution in the ordinary criminal cases, but in capital cases it would be wise to authorize a refusal of all pleas of guilty; for a mistake in such cases would be irremediable.1

If the plea is *not guilty,* it becomes necessary for the State to show by competent, legal evidence, that the defendant has committed the crime wherewith he is charged. Except in a few cases, where the subject-matter of the testimony forms a part of a public record, or consists of the dying declaration of the murdered man in a case of homicide, which are made exceptions to the rule by the necessities of criminal jurisprudence, the evidence is presented to the court by the testimony of witnesses. It is the invariable rule of the criminal law, which is believed to be guaranteed by the constitutional limitations, that the testimony must be given in open court by the witnesses orally, so that the defendant will have an opportunity to cross-examine them.2

According to English and American law, the presumption of innocence of the accused, until that presumption is overthrown by evidence to the contrary, is generally held to require the prosecution to dissipate every reasonable doubt before the

defendant can be justly pronounced guilty. But this principle of criminal law does not prevent the legislature from declaring by statute that certain facts when proven create a presumption of guilt, or shall be taken as *prima facie* evidence of guilt. It would, of course, be different if the statute created a conclusive presumption of guilt from the proof of certain facts. Such a conclusive presumption when created by statute, would be a violation of the constitutional requirement of "due process of law."1

One of the most important constitutional requirements in this connection, and that which most distinguishes the common-law system of criminal procedure from that of the European continent, is that the accused can never be compelled to criminate himself by his evidence. Nor can he be compelled to testify to any degree whatever. On the continent of Europe he is compelled to answer every question that is propounded to him by the presiding judge. In England and America he may now testify in his own behalf, but the privilege of remaining silent is so strictly guarded, that it is very generally held to be error for the State to comment on, and to draw adverse inferences from, his failure to take advantage of the opportunity to testify in his own behalf. The Anglo-Saxon spirit of fair play requires the State to convict the accused without the aid of extorted confessions, and will not allow such criticisms on his silence.2 But if he goes upon the witness-stand, while he still has the privilege of deciding how far and as to what facts he shall testify, and may refuse to answer questions which may tend to criminate him, the State attorney may comment on the incompleteness of the evidence and his refusal to answer proper questions. Having put himself upon the stand, very little weight can be given to his testimony, if he does not tell the whole truth, as well as nothing but the truth.1

It is hardly necessary to state that a full opportunity must be given to the accused to defend himself against the charge of the State. Without such an opportunity, the proceeding would be only *ex parte*.2 For that reason, a State statute has been declared to be unconstitutional, which provides that the jury may return a verdict of guilty of embezzlement, on an indictment which charges the defendant with larceny.3

[Back to Table of Contents]

§ 41.

Trial By Jury—Legal Jeopardy.—

All prosecutions are tried at common law by a jury, and in some of our State constitutions the right of trial by jury is expressly guaranteed.4 Where the right is guaranteed without restriction, it means a common-law trial by jury; and where at common law certain offenses were triable by the court without the aid of a jury, the jury is not now required.1 Whether in the absence of an express guaranty of the trial by jury, it could be abolished by the legislature, is difficult to determine. If one can keep his judgment unbiased by the prevailing sentiment, which makes of the jury "the palladium of liberty," "the nation's cheap defender," etc., it would seem that he must conclude that the jury is not needed to make the trial "due process of law;" and where the constitutional clause reads in the alternative, as it did in the *Magna Charta,* "by the judgment of his peers or the law of the law," the presumption becomes irresistible that when the trial by jury is not expressly guaranteed the power of the legislature to abolish the jury system is free from constitutional restraint. But in the present temper of public opinion concerning the sacredness of the right of trial by jury, it would not be surprising if the courts should pronounce an express guaranty to be unnecessary.

But, in enforcing the constitutional requirement of a trial by jury, the courts recognize the full right of the legislature to prescribe the mode and manner of conducting trials by jury, as long as the right itself has not been materially impaired thereby. It is, for example, permissible for the legislature to reduce the number of jurors in a panel, whether the change refers to the grand or petit juries.1

So, likewise, is the legislature empowered to regulate and change the grounds of challenge to jurors.2

So, also, a statute, authorizing struck juries, is not constitutionally objectionable, because it is a privilege of which very few can afford to avail themselves.3

It would, of course, be unconstitutional, if there was any discrimination, by law or by jury commissioners, in administering the law, against any race in making up the list of jurors, or in drawing the panels.4

The last constitutional requirement concerning criminal trials to be considered is that which declares that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." A person is said to have been in legal jeopardy when he is brought before a court of competent jurisdiction for trial, on a charge that is properly laid before the court, in the form of an indictment or an information, and a jury has been impaneled and sworn to try him. When this is done, the defendant is entitled to have the case proceed to a verdict, and if the prosecution should be dropped by the entry of a *nolle prosequi* against the defendant's will, it is of the same effect as if the case had ended in acquittal of the defendant. There cannot be any second prosecution

for the same offense.1 But if the prosecution should fail on account of some defect in the indictment, or for want of jurisdiction,2 or if for unavoidable reasons, the court has to adjourn and the jury be discharged without a verdict,1 as when the death of a judge or of a juror occurs,2 or the jury is unable, after a reasonable effort, to agree upon a verdict, and a mistrial has to be ordered.3 A second prosecution may also be instituted when a verdict is set aside, or the judgment reversed, on the ground of error.4

[Back to Table of Contents]

§ 42.

Right Of Appeal.—

In the English criminal law, no provision whatever is made for the review of criminal convictions by the higher or appellate courts; the only relief from an unjust verdict being an appeal to the Home Secretary of the government, who will recommend a pardon by the Crown, if the facts of the case warrant it. In this country, the right of appeal to the higher courts is generally provided for in criminal, as in civil, cases. So universal is this provision for an appeal in criminal cases, that there is a manifest disposition to claim the right of appeal to the courts of last resort as an inalienable constitutional right. But the cases, in which the claim is made, that any denial or limitation of the right of appeal is a violation of the constitutional guaranty of "due process of law," have generally denied the claim, and maintained that a right of review in criminal cases by an appellate court "is not a necessary element of due process of law, but it is wholly within the discretion of each State to refuse it or grant it on any terms."[1]

SECTION 43. —Imprisonment for crime—Hard labor—Control of convict in prison.
43*a*. —Convict lease system.

[Back to Table of Contents]

§ 43.

Imprisonment For Crime—Hard Labor—Control Of Convicts In Prison.—

The most common mode of punishment for crime at the present day is confinement in some jail or penitentiary. The liberty of the convict is thus taken away for a specified period, the length of which is graded according to the gravity of the offense committed. What shall be the proper amount of imprisonment to be imposed as a reasonable punishment for a particular crime is a matter of legislative discretion, limited only by the vague and uncertain constitutional limitation, which prohibits the infliction of "cruel and unusual punishments."2 Within the walls of the prison the convict must conduct himself in an orderly manner, and conform his actions to the ordinary prison regulations. If he should violate any of these regulations, he may be subjected to an appropriate punishment, and for serious cases of insubordination, corporal punishment is very often inflicted, even in those States in which the whipping-post has been abolished.3

For minor offenses, it is usual to confine the criminal in the county jail, and the punishment consists only of a deprivation of one's liberty. But for more serious and graver offenses, the statutes provide for the incarceration of the convict in the penitentiary, where he is required to perform hard labor for the benefit of the State. The product of his labor is taken by the State in payment of the cost of his maintenance. It cannot be doubted that the State has a constitutional right to require its convicts to work during their confinement, and there has never been any question raised against the constitutionality of such regulations.1 The penitentiary system is now a well-recognized feature of European and American penology.

[Back to Table of Contents]

§ 43*A*.

Convict Lease System.—

An interesting question has lately arisen in this country, in respect to the State control of convicts. In many of the Southern States, instead of confining the convict at hard labor within the walls of the penitentiary, in order to get rid of the burden of maintaining and controlling them within the penitentiary, provision was made for leasing the convicts to certain contractors to be worked in different parts of the State, usually in the construction of railroads. The entire control of the convict was transferred to the lessee, who gave bond that he would take care and guard them, and promised to pay a penalty to the State for the escape of each convict. The frequency of the reports of heartless cruelty on the part of lessees towards the convicts, prompted by avarice and greed, and rendered possible by the most limited supervision of the State, has aroused public sentiment in opposition to the convict lease system in some of these States, and we may confidently expect a general abolition of the system at no very distant day. But it is still profitable to consider the constitutionality of the law, upon which the convict lease system is established. In Georgia, the constitutionality of the law was questioned, but sustained. In pronouncing the statute constitutional, the court said: "In the exercise of its sovereign rights for the purpose of preserving the peace of society, and protecting the rights of both person and property, the penitentiary system of punishment was established. It is a part of that police system necessary, as our lawmakers thought, to preserve order, peace and the security of society. The several terms of these convicts fixed by the judgments of the courts under the authority of the law, simply subject their persons to confinement, and to such labor as the authority may lawfully designate. The sentence of the courts under a violated law confers upon the State this power, no more; the power to restrain their liberty of locomotion, and to compel labor not only for the purposes of health, but also to meet partially or fully the expenses of their confinement. The confinement necessarily involved expenses of feeding, clothing, medical attention, guards, etc., and this has been in its past history a grievous burden upon the taxpayers of the State. Surely it was competent for the sovereign to relieve itself of this burden by making an arrangement with any person to take charge of these convicts and confine them securely to labor in conformity with the judgments against them for a time not exceeding their terms of sentence. It was a transfer by the State to the lessee of the control and labor of these persons in consideration that they would feed, clothe, render medical aid and safely keep them during a limited period."[1] It cannot be doubted that, as a general proposition, in the absence of express constitutional limitations as to the place of imprisonment and labor, the convict could be confined and compelled to labor in any place within the State, and in fact he may be compelled to lead a migratory life, going from place to place, performing the labor required of him by the law of the land.[2] And the only case in which such a disposition of the convict may be questioned, would be where this law was made to apply to one, who had been convicted under a different law, the terms of which allowed or required the sentence to provide for confinement at hard labor within the walls of the penitentiary.

A convict under such a sentence could not, in the enforcement of a subsequent statute, be taken out of the penitentiary and be compelled to work in other parts of the State. The application of the new law in such a case would give it a retrospective operation, and make it an *ex post facto* law. But ordinary constitutional limitations would not be violated in the application of such a law to those who may be convicted subsequently. The convict lease system is not open to constitutional objection, because it provides for the convict to be carried from place to place, performing labor wherever he is required. The objectionable feature of the system is the transfer to private persons, as a vested right, of the control over the person and actions of the convict. It is true that all the rights of the individual are subject to forfeiture as a punishment for crime, and the State government, as the representative of society, is empowered to declare the forfeiture under certain constitutional limitations. The State may subject the personal liberty of the convict to restraint, but it cannot delegate this power of control over the convict, any more than it can delegate to private individuals the exercise of any of its police powers. The maxim, *delegatus non delegare potest* finds an appropriate application, in this connection.1 Certainly, when we consider the great likelihood of cruel treatment brought about by the greed and avarice of the lessees of the convict, personal interest outweighing all considerations of humanity, it would not require any stretch of the meaning of words to declare the convict lease system a “cruel and unusual punishment.” The State may employ its convicts in repairing its roads, in draining swamp lands, and carrying on other public works; the State may even lease the convicts to labor, the lessee assuming the expense of maintaining and guarding them, provided the State through its officials has the actual custody of them; but the State cannot surrender them to the custody of private individuals. Such a system resembles slavery too much to be tolerated in a free State.

[Back to Table of Contents]

CHAPTER V.

THE CONTROL OF DANGEROUS CLASSES, OTHERWISE THAN BY CRIMINAL PROSECUTION.

[Back to Table of Contents]

§ 44.

Confinement For Infectious And Contagious Diseases.—

The right of the State, through its proper officer, to place in confinement and to subject to regular medical treatment those who are suffering from some contagious or infectious disease, on account of the danger to which the public would be exposed if they were permitted to go at large, is so free from doubt that it has been rarely questioned.1 The danger to the public health is a sufficient ground for the exercise of police power in restraint of the liberty of such persons. This right is not only recognized in cases where the patient would otherwise suffer from neglect, but also where he would have the proper attention at the hands of his relatives. While humanitarian impulses would prompt such interference for the benefit of the homeless, the power to confine and to subject by force to medical treatment those who are afflicted with a contagious or infectious disease, rests upon the danger to the public, and it can be exercised, even to the extent of transporting to a common hospital or *lazaretto* those who are properly cared for by friends and relatives, if the public safety should require it.1

But while it may be a legitimate exercise of governmental power to establish hospitals for the care and medical treatment of the poor, whatever may be the character of the disease from which they are suffering, unless their disease is infectious, their attendance at the hospital must be free and voluntary. It would be an unlawful exercise of police power, if government officials should attempt to confine one in a hospital for medical treatment, whose disease did not render him dangerous to the public health. As a matter of course, the movements of a person can be controlled, who is in the delirium of fever, or is temporarily irrational from any other cause; but such restraint is permissible only because his delirium disables him from acting rationally in his own behalf. But if one, in the full possession of his mental faculties, should refuse to accept medical treatment for a disease that is not infectious or contagious, while possibly, in a clear case of beneficial interference in an emergency, no exemplary or substantial damages could be recovered, it would nevertheless be an unlawful violation of the rights of personal liberty to compel him to submit to treatment. The remote or contingent danger to society from the inheritance of the disease by his children would be no ground for interference. The danger must be immediate.

[Back to Table of Contents]

§ 45.

The Confinement Of The Insane.—

This is one of the most important phases of the exercise of police power, and there is the utmost need of an accurate and exact limitation of the power of confinement. In the great majority of the cases of confinement for insanity, it is done at the request and upon the application of some loving friend or relative; the parent secures the confinement of his insane child, the husband that of his demented wife, and *vice versa;* and no doubt in comparatively few cases is there the slightest ground for the suspicion of oppression in the procurement of the confinement. But cases of the confinement of absolutely sane people, through the promptings of greed and avarice, or through hate and ignorance, do occur, even now, when public opinion is thoroughly aroused on the subject, and they occurred quite frequently in England, when private insane asylums were common.1

Although these cases of unjust confinement are probably infrequent, perhaps rare, still the idea of the forcible confinement in an insane asylum of a sane person is so horrible, and the natural fear is so great that the number of such cases is underestimated, because of the difficulty experienced in procuring accurate statistical knowledge (that fear being heightened by the well-known differences of opinion, among medical experts on insanity, wherever a case comes up in our courts for the adjudication upon the sanity or insanity of some one), one is inclined, without hesitation, to demand the rigorous observance of the legal limitations of power over the insane, and it becomes a matter of great moment, what constitutional limitations there are, which bear upon this question.1

In what relation does the insane person stand to the State? It must be that of guardian and ward. The State may authorize parents and relatives to confine and care for the insane person, but primarily the duty and right of confinement is in the State. “This relation is that of a ward, who is a stranger to his guardian, of a guardian who has no acquaintance with his ward.”2 In the consideration of the rights and duties incident to this relation it will be necessary, first, to consider the circumstances under which the confinement would be justifiable, and the grounds upon which forcible confinement can be sustained, and then determine what proceedings, preliminary to confinement, are required by the law to make the confinement lawful.

The duty of the State, in respect to its insane population, is not confined to a provision of the means of confinement, sufficient to protect the public against any violent manifestations of the disease. The duty of the State extends further, and includes the provision of all the means known to science for the successful treatment of the diseased mind. This aspect of the duty of the State is so clearly and unequivocally recognized by the authorities and public opinion in some of the States, that the statutes impose upon the State asylums the duty of receiving all *voluntary* patients for medical treatment, upon the payment of the proper reasonable fees, and retaining

them as long as such patients desire to remain. In this respect the insane asylum bears the same relation to the public as the hospital does. As long as coercion is not employed, there would seem to be no limit to the power of the State to provide for the medical treatment of lunatics, except the legislative discretion and the fiscal resources of the State. But when the lunatic is subjected to involuntary restraint, then there are constitutional limitations to the State's power of control.

If the lunatic is dangerous to the community, and his confinement is necessary as a means of protecting the public from his violence, one does not need to go farther for a reason sufficient to justify forcible restraint. The confinement of a violent lunatic is as defensible as the punishment of a criminal. The reason for both police regulations is the same, viz.: to insure the safety of the public.

But all lunatics are not dangerous. It is sometimes maintained by theorists that insanity is always dangerous to the public, even though it may be presently of a mild and apparently harmless character, because of the insane propensity for doing mischief, and the reasonable possibility of a change in the character of the disease. But the same might be said of every rational man in respect to the possibility of his committing a crime. Some one has said, all men are potential murderers. The confinement of one who is liable to outbursts of passion would be as justifiable as the confinement of a harmless idiot, whose *dementia* has never assumed a violent form, and is not likely to change in the future, simply for the reason that there is a bare possibility of his becoming dangerous.

But the State, in respect to the care of the insane, owes a duty to these unfortunate people, as well as to the public. The demented are as much under a natural disability as minors of tender age, and the State should see that the proper care is taken of them. The position has been already assumed and justified that the State may make provisions for the reception and cure of voluntary patients, suffering from any of the forms of *dementia,* and for the same reason that the proper authority may forcibly restrain one who is in the delirium of fever and subject him to medical treatment, the State has undoubtedly the right to provide for the involuntary confinement of the harmlessly insane, in order that the proper medical treatment may be given, and a cure effected. The benefit to the unfortunate is a sufficient justification for the involuntary confinement. He is not a rational being, and cannot judge for himself what his needs are. Judge Cooley says: "An insane person, without any adjudication,[1] may also lawfully be restrained of his liberty, for his own benefit, either because it is necessary to protect him against a tendency to suicide or to stray away from those who would care for him, or because a proper medical treatment requires it."[2] If the possible cure of the patient be the only ground upon which a harmless lunatic could be confined, as soon as it has become clear that he is a hopeless case, for which there is no cure, he becomes entitled to his liberty. As already stated, the mere possibility of his becoming dangerous, through a change in the character of the disease, will not justify his further detention. But the confinement of a hopeless case of harmless lunacy may be continued, where the lunacy is so grave that the afflicted person is unable to support himself or to take ordinary care of himself, and where if discharged he will become a burden upon the public. That manifestly could only happen where the lunatic was a pauper. If he is possessed of means, and his friends and relatives are willing to take

care of him the forcible confinement cannot be justified. These points are so clearly sustained by reason that authorities in support of them would not be necessary, if they could be found.1 The difficulties, in respect to the question of confinement of the insane, arise only when we reach the discussion of the preliminary proceedings, which the law requires to justify the forcible restraint of an insane person.

It is a constitutional provision of all the States, as well as of the United States, that "no man shall be deprived of his life, liberty, and property, except by due process of law." There must be a judicial examination of the case, with a due observance of all the constitutional requirements in respect to trials; and the restraint of one's liberty, in order to be lawful, must be in pursuance of a judgment of a court of competent jurisdiction, after one has had an opportunity to be heard in his own defense. This is the general rule. The imprisonment of a criminal, except as preliminary to the trial, can only be justified when it rests upon the judgment of the court. Since this constitutional provision is general and sweeping in its language, there can be no doubt of its application to the case of confinement of the insane, and we would, from a consideration of this constitutional guaranty, be forced to conclude that, except in the case of temporary confinement of the dangerously insane, no confinement of that class of people would be permissible, except when it is done in pursuance of a judgment of a court, after a full examination of the facts and after an opportunity has been given to the person charged with insanity to be heard in his own defense. Indeed, there is no escape from this conclusion. But the adjudications and State legislation do not seem to support this position altogether.

It is universally conceded that every man for his own protection may restrain the violence of a lunatic, and any one may, at least temporarily, place any lunatic under personal restraint, whose going at large is dangerous to others.1 But this restraint has been held by some authorities to be justifiable without adjudication, only while the danger continues imminent, or as preliminary to the institution of judicial proceedings by which a judgment for permanent confinement may be obtained.2 It is believed that no court would justify a permanent confinement of an insane person at the instance of a stranger without adjudication; and in almost all of the States the statutes provide for an adjudication of the question of insanity in respect to any supposed lunatic found going at large and without a home, and forbid the confinement of such person, except after judgment by the court.3 It may be assumed, therefore, that in those States the permanent confinement of an alleged insane person cannot be justified by proof of his insanity, not even of his dangerous propensities, where the confinement was at the instance of a stranger or an officer of the law, unless it be in pursuance of a judgment of a court of competent jurisdiction.

But where the confinement is on the request of relatives, whose natural love and affection would ordinarily be ample protection against injustice and wrong, there is a tendency to relax the constitutional protection, and hold that relatives may procure the lawful confinement of the insane, without a judicial hearing, provided there is actual insanity. The cases generally hold that extra-judicial confinement at the instance of relatives is lawful, where the lunatic is harmless, as well as in the case of dangerous lunacy, and it would appear that this is the prevailing opinion.1 If the objections to a judicial hearing were sustainable at all, it would seem that, in these cases of

confinement on the request of relatives, there would be the least need of this constitutional protection, particularly as the person confined can always, by his own application, or through the application of any one who may be interested in him, have his case brought before a court for a judicial hearing, in answer to a writ of *habeas corpus.* And it may be that he needs no further protection. But there is still some room for the unlawful exercise of this power of control, prompted by cupidity or hate. This danger may be extremely limited, and the cases of intentional confinement of sane persons may be rare; still the fact that they have occurred, the difficulty in procuring a hearing before the court after confinement, as well as the explicit declaration of the constitution that no man's liberty can be restrained, except by due process of law, urge us to oppose the prevailing opinion, and to require a judicial hearing to justify any case of confinement, except where an immediately threatening danger renders a temporary restraint of the insane person necessary, as a protection to the public or to himself.1

As a necessary corollary to the commitment of insane persons to asylums and the deprivation of their liberty, the courts have assumed the power, by the appointment of guardians or committees, to take charge of and to administer the estates of such persons. The power of the courts, to exercise this control of the property of a lunatic, cannot be seriously or successfully contested.1

Generally, the asylums are State institutions; but private asylums are still permitted under the supervision of the State authorities, and subject to the regulations, prescribed by law, as to the character and furnishings of the buildings, the provisions for the care and custody of the patients, and the inspection of the establishments by the Commissioners in Lunacy or other officials, who are charged with the supervision of the asylums and the care of the insane. Indeed, in one California case, the right to maintain a private asylum for the insane was recognized as protected by constitutional limitations from unreasonable and arbitrary regulations.1

[Back to Table of Contents]

§ 46.

Control Of The Insane In The Asylum.—

Another important question is, how far the keepers of an insane person may inflict punishment for the purpose of control. When one is confined in an asylum, on account of insanity, the very mental helplessness would prompt a humanitarian method of treatment, as the best mode of effecting a cure, and the keepers should be severely punished for every act of cruelty, of whatever nature it may be. But still every one will recognize the necessity at times for the infliction of punishment, not only for the proper maintenance of order and good government in the asylum, but also for the good of the inmates. Because one is insane, it does not necessarily follow that he is not influenced in his actions by the hope of reward and the fear of punishment, and, when the infliction of punishment is necessary, it is justifiable. But there is so great an opportunity for cruel treatment, without any means of redress or prevention, that the most stringent rules for the government and inspection of asylums should be established and enforced. But within these limitations any mode of reasonable punishment, even corporal punishment, is probably justifiable on the plea of necessity.

[Back to Table of Contents]

§ 47.

Punishment Of The Criminal Insane.—

It is probably the rule of law in every civilized country, that no insane man can be guilty of a crime, and hence can not be punished for what would otherwise be a crime. The ground for this exception to criminal responsibility is, that there must be a criminal intent, in order that the act may constitute a crime, and that an insane person cannot do an intentional wrong. Insanity, when it is proven to have existed at the time when the offense was committed, constitutes a good defense, and the defendant is entitled to an acquittal. If the person is still insane, he can be confined in an asylum, until his mental health is restored, when he will be entitled to his release, like any other insane person. In some of the States, a verdict of acquittal on the ground of insanity, in a criminal prosecution, raises a *prima facie* presumption of insanity at the time of acquittal, which will authorize his commitment to an asylum, without further judicial investigation. Other State statutes provide for his detention, until it can be ascertained by a special examination whether the insanity still continues. But as soon as it is made plain that his reason is restored, he is entitled to his liberty. If his confinement was intentionally continued after his restoration to reason, it would practically be a punishment for the offense or wrong. Mr. Cooley says: "It is not possible constitutionally to provide that one shall be imprisoned as an insane person, who can show that he is not insane at all."[1] This is very true, but I will attempt to show that there is no constitutional objection to the confinement of the criminal insane after restoration to sanity, as a punishment for the offense which was committed under the influence of insanity. The chief objection to be met in the argument in favor of the punishment of insane persons for the crime or wrong which they have committed, lies in the commonly accepted doctrine, that a criminal intent, which an insane person is not capable of harboring, constitutes the essential element of a crime. Without the intent to do wrong there can be no crime. But that is merely an assumption, which rests upon a fallacy in respect to the grounds upon which the State punishes for crime, and which, as soon as it is recognized as a controlling principle, is practically abrogated by dividing criminal intent into *actual* and *presumed.* It is found on applying the rule to the ordinary experiences of life, that it does not fulfill all the demands of society; for a strict adherence to the principle would exclude from the list of crimes very many offenses, which the general welfare requires to be punished. A man, carried away by a sudden heat of passion, slays another. The provocation enabled the animal passions in him to fetter and blind the reason, and without any exercise of will, if by will we mean a rational determination, these passions, differing only in degree and duration from the irresistible impulse of insanity, urged him on to the commission of an act, which no one so bitterly regrets as he does himself, after his mental equilibrium has been restored. Where is the criminal intent in most cases of manslaughter? We are told that the law will presume an intent from the unlawful act.

A man becomes intoxicated with drink, and thus bereft of his reason he commits a crime. Momentarily he is as much a *non compos mentis* as the permanently insane.

But he is neverthless punished for his wrongful act; and we are told, in response to our inquiry after the criminal intent, that the law will again presume it from the act; for by intoxication he has voluntarily deprived himself of his reasoning faculties, and can not be permitted to prove his drunkenness, in order to claim exemption from criminal responsibility. A man handles a fire-arm or some other dangerous machine or implement with such gross negligence that the lives of all around are endangered, and one or more are killed. The law, at least in some of the States, makes the homicide a crime, and punishes it as one grade of manslaughter, and very rightly. But where is the criminal intent? By the very description of the act, all criminal intent is necessarily excluded. It is negligence, which is punished as a crime.

Now these cases of *presumed* intent are recognized as exceptions to the rule, which requires an actual intent to do wrong in order to constitute a crime, because it is felt that something in the way of punishment must be inflicted to prevent the too frequent occurrence of such wrongs, even though there is involved in the commission of them no willful or intentional infraction of right.

The idea, that the intent was a necessary element of a crime, was derived from the conception of a wrong in the realms of ethics and religion, and is but an outcome of the doctrine of free will. When a man has the power to distinguish and choose between right and wrong, and intentionally does a wrong thing, he is then guilty of immorality, and if the act is forbidden by law, of a crime; and punishment ought to follow as a just retribution for the wrongful act. But if a man cannot, from any uncontrollable cause, distinguish between right and wrong, or if the act is an accident, and he does harm to his neighbor, not having rationally determined to do a thing which he knew to be wrong, he is not guilty of a moral wrong, nor of a crime. If the human punishment of crimes rested upon the same grounds, and proceeded upon the same principles, on which, as we are told, the God of the Universe metes out a just retribution for the infractions of His laws, then clearly there can be no punishment of wrongful acts, as crimes, where there is no moral responsibility. But the punishment of crimes does not rest upon the same grounds and principles. The human infliction of punishment is an exercise of police power and there is no better settled rule than that the police power of a State must be confined to those remedies and regulations which the safety, or at least the welfare, of the public demands. We punish crimes, not because the criminals deserve punishment, but in order to prevent the further commission of the crime by the same persons and by others, by creating the fear of punishment, as the consequence of the wrongful act. A man, laboring under an insane propensity to kill his fellowman, is as dangerous, indeed he is more dangerous, than the man who, for gain, or under the influence of his aroused passions, is likely to kill another. The insane person is more dangerous, because the same influences are not at work on him, as would have weight with a rational, but evil disposed person. And this circumstance would no doubt require special and peculiar regulation for the punishment of the insane, in order that it may serve as a protection to the public, and a restraint upon the harmful actions of the lunatic. If, therefore, the protection to the public be the real object of the legal punishment of crimes, it would be as lawful to punish an insane person for his wrongful acts as one in the full possession of his mental faculties. The lunatic can be influenced by the hope of reward and the fear of punishment, and he can be prevented in large measure from doing wrong by

subjecting him to the fear of punishment. This is the principle upon which the lunatics are controlled in the asylums. It would be no more unconstitutional to punish a lunatic outside of the asylum.

It is not likely that this view of the relation of the insane to the criminal law will be adopted at an early day, if at all; for the moral aspect of punishment has too strong a hold upon the public.1 But if its adoption were possible, it would reduce to a large extent the number of crimes which are alleged to have been committed under the influence of an insanity, which has never been manifested before the wrongful occurrence, and has, immediately thereafter, entirely disappeared.

[Back to Table of Contents]

§ 48.

Confinement Of Habitual Drunkards.—

It is the policy of some States, notably New York, to establish asylums for the inebriate, where habitual drunkards are received and subjected to a course of medical treatment, which is calculated to effect a cure of the disease of drinking, as it is claimed to be. A large part of human suffering is the almost direct result of drunkenness, and it is certainly to the interest of society to reduce this evil as much as possible. The establishment and maintenance of inebriate asylums can, therefore, be lawfully undertaken by the State. The only difficult constitutional question, arising in this connection, refers to the extent to which the State may employ force in subjecting the drunkard to the correcting influences of the asylum. Voluntary patients can, of course, be received and retained as long as they consent to remain. But they cannot be compelled to remain any longer than they desire, even though they have, upon entering the asylum, signed an agreement to remain for a specified time, and the time has not expired.1 The statutes might authorize the involuntary commitment of inebriates, who are so lost to self-control that the influence of intoxicating liquor amounts to a species of insanity, called dipsomania.2 But if the habit of drunkenness is not so great as to deprive the individual of his rational faculties, the State has no right to commit him to the asylum for the purpose of effecting a reform, no more than the State is authorized to forcibly subject to medical and surgical treatment one who is suffering from some innocuous disease. If the individual is rational, the only case in which forcible restraint would be justifiable, would be where the habit of drunkenness, combined with ungovernable fiery passions, makes the individual a source of imminent danger. Every community has at least one such character, a passionate drunkard, who terrorizes over wife and children, subjects them to cruel treatment, and is a frequent cause of street brawls, constantly breaking the peace and threatening the quiet and safety of law-abiding citizens. The right of the State to commit such a person to the inebriate asylum, even where there has been no overt violation of the law, cannot be questioned. A man may be said to have a natural right to drink intoxicating liquor as much as he pleases, provided that in doing so he does not do or threaten positive harm to others.1 Where, from a combination of facts or circumstances, his drunkenness does directly produce injury to others,—whether they be near relatives, wife and children, or the community at large,—the State can interfere for the protection of such as are in danger of harm, and forcibly commit the drunkard to the inebriate asylum.2 It may be said that any form of drunkenness produces harm to others, in that it is calculated to reduce the individual to pauperism and throw upon the public the burden of supporting him and his family. But that is not a proximate consequence of the act, and no more makes the act of drunkenness a wrong against the public or the family than would be habits of improvidence and extravagance. For a poor man, intoxication is an extravagant habit. The State can only interfere when the injury to others is a proximate and direct result of the act of drunkenness, as, for example, where the drunkard was of a passionate nature, and was in the habit of beating those about him while in this drunken frenzy. This is a direct

and proximate consequence, and the liability to this injury would be sufficient ground for the interference of the State. But in all of these cases of forcible restraint of inebriates, the restraint is unlawful, except temporarily to avert a threatening injury to others, unless it rests upon the judgment of a court, rendered after a full hearing of the cause. The commitment on *ex parte* affidavits would be in violation of the general constitutional provision, that no man can be deprived of his liberty, except by due process of law.1

[Back to Table of Contents]

§ 49.

Police Control Of Vagrants.—

The vagrant has been very appropriately described as the chrysalis of every species of criminal. A wanderer through the land, without home ties, idle, and without apparent means of support, what but criminality is to be expected from such a person? If vagrancy could be successfully combated, if every one was engaged in some lawful calling, the infractions of the law would be reduced to a surprisingly small number; and it is not to be wondered at that an effort is so generally made to suppress vagrancy. The remedy is purely statutory, as it was not an offense against the common law. The statutes are usually very explicit as to what constitutes vagrancy, and a summary proceeding for conviction, before a magistrate and without a jury, is usually provided, and the ordinary punishment is imprisonment in the county jail.

The provisions of the State statutes on the subject bear a very close resemblance, and usually set forth the same acts as falling within the definition of vagrancy. Webster defines a vagrant or vagabond to be "one who wanders from town to town, or place to place, having no certain dwelling, or not abiding in it, and usually without the means of livelihood." In the old English statutes, they are described as being "such as wake on the night, and sleep on the day, and haunt customable taverns and ale-houses, and routs about; and no man wot from whence they come, nor whither they go." The English, and some of the American statutes, have stated very minutely what offenses are to be included under vagrancy. But, apart from those acts which would fall precisely under Mr. Webster's definition, the acts enumerated in the statutes in themselves constitute distinct offenses against public peace, morality, and decency, and should not be classified with vagrancy, properly so-called. Thus, for example, an indecent exposure of one's person on the highway, a boisterous and disorderly parade of one's self by a common prostitute, pretending to tell fortunes and practicing other deceptions upon the public, and other like acts, are distinct offenses against the public, and the only apparent object of incorporating them into the vagrant act is to secure convictions of these offenses by the summary proceeding created by the act.1 Mr. Webster's definition will therefore include all acts that can legitimately come within the meaning of the word *vagrancy.*

What is the tortious element in the act of vagrancy? Is it the act of listlessly wandering about the country, in America called "tramping?" Or is it idleness without visible means of support? Or is it both combined? Of course, the language of the particular statute, under which the proceeding for conviction is instituted, will determine the precise offense in that special case, but the offense is usually defined as above. If one does anything which directly produces an injury to the community, it is to be supposed that he can be prevented by appropriate legislation. While an idler running about the country is injurious to the State indirectly, in that such a person is not a producer, still it would not be claimed that he was thus inflicting so direct an injury upon the community as to subject him to the possibility of punishment. A man has a

legal right to live a life of absolute idleness, if he chooses, provided he does not, in so living, violate some clear and well defined duty to the State. To produce something is not one of those duties, nor is it to have a fixed permanent home. But it is a duty of the individual so to conduct himself that he will be able to take care of himself, and prevent his becoming a public burden. If, therefore, he has sufficient means of support, a man may spend his whole life in idleness and wandering from place to place. The gist of the offense, therefore, is the doing of these things, when one has no visible means of support, thus threatening to become a public burden. The statutes generally make use of the words, "without visible means of support." What is meant by "visible means?" Is it a man's duty to the public to make his means of support visible, or else subject himself to summary punishment? Is it not rather the duty of the State to show affirmatively that this "tramp" is without means of support, and not simply prove that his means of support are not apparent? Such would be a fair deduction by analogy from the requirements of the law in respect to other offenses. But the very difficulty, in proving affirmatively that a man has no means of support, is, no doubt, an all-sufficient reason for this departure from the general rule in respect to the burden of proof, and for confining the duty of the State to the proof that the person charged with vagrancy is without *visible* means of support, and throwing upon the individual the burden of proving his ability to provide for his wants.

An equally difficult question is, what amount and kind of evidence will be sufficient to establish a *prima facie* case of invisibility of the means of support? If a man is found supporting himself in his journeyings by means of begging, no doubt that would be deemed sufficient evidence of not having proper means of support. But suppose it cannot be proven that be begs. Will the tattered and otherwise dilapidated condition of his attire be considered evidence of a want of means? The man may be a miser, possessed of abundant means, which he hoards to his own injury. Has he not a right to be miserly, and to wear old clothes as long as he conforms to the requirement of decency, and may he not, thus clad, indulge in a desire to wander from place to place? Most certainly. He is harming no one, provided he pays for all that he gets, and it would be a plain violation of his right of liberty, if he were arrested on a charge of vagrancy, because he did not choose to expend his means in the purchase of fine linen. Or will the lack of money be evidence that he has no visible means of support? In the first place how can that be ascertained? Has the State a right to search a man's pockets in order to confirm a suspicion that he has no means of support? And even if such a search was lawful, or the fact that the defendant was without money was established in some other way, the lack of money would be no absolute proof of a want of means.

Again, a man may have plenty of money in his pocket, and yet have no lawful means of support. And if he is strongly suspected of being a criminal, he is very likely to be arrested as a vagrant. Indeed, the vagrant act is specially intended to reach this class of idlers, as a means of controlling them and ridding the country of their injurious presence. But there is no crime charged against them. They are usually arrested on mere suspicion of being, either concerned in a crime recently committed, or then engaged in the commission of some crime. That suspicion may rest upon former conviction for crime, or upon the presumptions of association, or the police officer may rely upon his ability to trace the lines of criminality upon the face of the

supposed offender. But in every case, where there is no overt criminal act, an arrest for vagrancy is based upon the suspicion of the officer, and it is too often unsupported by any reasonably satisfactory evidence. It is true that very few cases of unjust arrests, *i. e.,* of innocent persons, for vagrancy occur in the criminal practice; but with this mode of proceeding it is quite possible that such may occur. Moreover, the whole method of proceeding is in direct contradiction of the constitutional provisions that a man shall be convicted before punishment, after proof of the commission of a crime, by direct testimony, sufficient to rebut the presumption of innocence, which the law accords to every one charged with a violation of its provisions. In trials for vagrancy, the entire process is changed, and men are convicted on not much more than suspicion, unless they remove it, to employ the language of the English statute, by "giving a good account of themselves." It reminds one of the police regulation of Germany, which provides that upon the arrival of a person at an inn or boarding-house, the landlord is required to report the arrival to the police, with an account of one's age, religion, nationality, former residence, proposed length of stay, and place of destination. Every one is thus required to "give a good account of" himself, and the regulation is not confined in its operations to suspicious characters. Whatever may be the theoretical and technical objections, to which the vagrancy laws are exposed, and although the arrest by mistake of one who did not properly come under the definition of a vagrant would possibly subject the officer of the law to liability for false imprisonment, the arrest is usually made of one who may, for a number of the statutory reasons, be charged with vagrancy, and no contest arises out of the arrest. But if the defendant should refuse to give testimony in defense, and ask for an acquittal on the ground that the State had failed to establish a *prima facie* case against him, unless the statute provided that a want of lawful means of support is sufficiently proved by facts which otherwise would create a bare suspicion of impecuniosity, the defendant would be entitled to a discharge. Punishment for vagrancy is constitutional, provided the offense is proven, and conviction secured in a constitutional manner. And since the summary conviction deprives one of the common-law right of trial by jury, the prosecutions should and must be kept strictly within the limitation of the statute.

The constitutionality of the vagrancy laws has been sustained by the courts, although in none of the cases does it appear that the court considered the view of the question here presented. The discussion cannot be more fitly closed than by the following quotation from an opinion of Judge Sutherland, of the New York judiciary: "These statutes declaring a certain class or description of persons vagrants, and authorizing their conviction and punishment as such, as well as certain statutes declaring a certain class or description of persons to be disorderly persons, and authorizing their arrest as such, are in fact rather in the nature of public regulations to prevent crime and public charges and burdens, than of the nature of ordinary criminal laws, prohibiting and punishing an act or acts as a crime or crimes. If the condition of a person brings him within the description of either of the statutes declaring what persons shall be esteemed vagrants, he may be convicted and imprisoned, whether such a condition is his misfortune or his fault. His individual liberty must yield to the public necessity or the public good; but nothing but public necessity or the public good can justify these statutes, and the summary conviction without a jury, in derogation of the common law, authorized by them. They are constitutional, but should be construed strictly and

executed carefully in favor of the liberty of the citizen. Their description of persons who shall be deemed vagrants is necessarily vague and uncertain, giving to the magistrate in their execution an almost unchecked opportunity for arbitrary oppression or careless cruelty. The main object or purpose of the statutes should be kept constantly in view, and the magistrate should be careful to see, before convicting, that the person charged with being a vagrant is shown, either by his or her confession, or by competent testimony, to come exactly within the description of one of the statutes."[1]

A recent curious attempt, to regulate the criminal class by the suppression of vagrancy, was an ordinance of St. Louis, Missouri, which forbade anyone "knowingly to associate with persons having the reputation of being thieves, burglars, pickpockets, pigeon-droppers, bawds, prostitutes or lewd women, or gamblers or any other person, for the purpose or with the intent to agree, conspire, combine or confederate, first, to commit any offense, or second, to cheat or defraud any person of any money or property," etc. The ordinance was held to be unconstitutional, in that it was an unlawful invasion of the right of personal liberty. The court say: "It stands to reason that, if the legislature may forbid one to associate with certain classes of persons of unsavory or malodorous reputations, by the same token it may dictate who the associates of any one may be. * * * We deny the power of any legislative body in this country to choose for our citizens who their associates shall be. And as to that portion of the eighth clause which uses the words 'for the purpose or with the intent to agree, conspire, combine or confederate, first to commit any offense,' etc., it is quite enough to say that human laws and human agencies have not yet arrived at such a degree of perfection as to be able, without some overt act done, to discern and determine by what intent or purpose the human heart is actuated. So that, did we concede the validity of the former portion of the eighth clause, which we do not, still it would be wholly impracticable for human laws to punish or even to forbid, inproper intentions or purposes; for with mere guilty intention, unconnected with overt act or outward manifestation, the law has no concern."[1]

[Back to Table of Contents]

§ 50.

Police Regulation Of Mendicancy.—

Somewhat akin to the evil of vagrancy, and growing out of it, is common and public mendicancy. The instincts of humanity urge us to relieve our fellow-creatures from actual suffering, even though we fully recognize in the majority of such cases that the want is the natural consequence of vices, or the punishment which nature imposes for the violation of her laws. It would be unwise for State regulation to prohibit obedience to this natural instinct to proffer assistance to suffering humanity.2 Indeed, it would seem to be the absolute right of the possessors of property to bestow it as alms upon others, and no rightful law can be enacted to prohibit such a transfer of property. It certainly could not be enforced. But while we recognize the ennobling influence of the practice of philanthrohy, as well as the immediate benefit enjoyed by the recipient of charity, it must be conceded that unscientific philanthropy, more especially when it takes the form of indiscriminate almsgiving, is highly injurious to the welfare of the community. Beggars increase in number in proportion to the means provided for their relief. Simply providing for their immediate wants will not reduce the number. On the contrary their number is on the increase. State regulation of charity is therefore necessary, and is certainly constitutional. A sound philanthropy would call for the support of those who cannot from mental or physical deficiencies provide themselves with the means of subsistence, and include even those who in their old age are exposed to want in consequence of the lavish gratification of their vices and passions. But all charity institutions should be so conducted that every one, coming in contact with them, would be stimulated to work. Poor-houses should not be made too inviting in their appointments. After providing properly for the really helpless, it would then be fit and proper for the State to prohibit all begging upon the streets and in public resorts. Those who are legitimate subjects of charity should be required to apply to the public authorities. All others should be sent to the jail or work-house, and compelled to work for their daily bread. It is conceded that the State cannot prohibit the practice of private philanthropy, but it can prohibit public and professional begging, and, under the vagrant laws, punish those who practice it.

In the New England States, the English system of making paupers charges upon the towns, in which they reside, has with certain statutory modifications been retained or established. One would suppose that no one would question the right of the legislature to modify its poor laws at pleasure. But the doctrine of vested rights has been so well grounded in American Constitutional Law, that in a recent case in Vermont, it was gravely contended that a pauper has a vested right in the existing statutory provisions for his support, which could not be changed by subsequent legislation. But the Supreme Court of that State has held that “a pauper has no vested right in respect to how or where he shall be supported, nor has a town a vested right to be relieved from the charge of supporting any particular pauper.”1

[Back to Table of Contents]

§ 51.

Police Supervision Of Habitual Criminals.—

A very large part of the duties of the police in all civilized countries is the supervision and control of the criminal classes, even when there are no specific charges of crime lodged against them. A suspicious character appears in some city, and is discovered by the police detectives. He bears upon his countenance the indelible stamp of criminal propensity, and he is arrested. There is no charge of crime against him. He may never have committed a crime, but he is arrested on the charge of vagrancy, and since by the ordinary vagrant acts the burden is thrown upon the defendant to disprove the accusation, it is not difficult in most cases to fasten on him the offense of vagrancy, particularly as such characters will usually prefer to plead guilty, in order to avoid, if possible, a too critical examination into their mode of life. But to punish him for vagrancy is not the object of his arrest. The police authorities had, with an accuracy of judgment only to be acquired by a long experience with the criminal classes, determined that he was a dangerous character; and the magistrate, in order to rid the town of his presence, threatens to send him to jail for vagrancy if he does not leave the place within twenty-four hours. In most cases, the person thus summarily dealt with has been already convicted of some crime, is known as a confirmed criminal, and his photograph has a place in the "rogues' gallery." Now, so far as this person has been guilty of a violation of the vagrant laws, he is no doubt subject to arrest and can and should be punished for vagrancy, in conformity with the provisions of the statute. But so far as the police, above and beyond the enforcement of the vagrant law, undertake to supervise and control the actions of the criminal classes, except when a specific crime has been committed and the offender is to be arrested therefor, their action is illegal, and a resistance to the control thus exercised must lead to a release and acquittal of the offender. This is certainly true where the control and supervision of the habitual criminals are not expressly authorized by statute. But in some of our States, in connection with the punishment of vagrancy, provision is made for the punishment of any "common street beggar, common prostitute, habitual disturber of the peace, known pick-pockets, gambler, burglar, thief, watch-stuffer, ball-game player, a person who practices any trick, game or device with intent to swindle, a person who abuses his family, and any suspicious person who cannot give a reasonable account of himself."[1] Laws of this character have been enacted, and the constitutionality of them sustained in Ohio, Massachusetts, Maryland, Pennsylvania and Kentucky.[2] The only serious constitutional objection to these laws for the punishment of habitual criminals is that they provide a punishment for the existence of a *status* or condition, instead of for a crime or wrong against society or an individual. If an individual has become an habitual criminal, *i. e.,* that he has committed, and is still committing, a number of offenses against the law, for each and every offense he may be punished, and the punishment may very properly be made to increase with every repetition of the offense. But this person can hardly be charged with the *crime* of being a common or habitual law-breaker. After meting out to him

the punishment that is due to his numerous breaches of the law, he has paid the penalty for his infractions of the law, and stands before it a free man.

There can be no doubt that constant wrong-doing warps the mind, and more or less permanently changes the character, producing a common or habitual criminal. But to say that the being an habitual criminal is a punishable offense, is to say that human punishment is endless, for it is an attempt to punish a condition of mind and character, which only years of patient and arduous struggle can obliterate or change. The practical effect of such laws, when vigorously enforced, is to make of such a person an outlaw, without home or country, driven from post to post, for his habitual criminality is an offense against such laws of every community into which he may go, it matters not where the offenses were committed which made him an habitual criminal.1 Even the habitual criminal has a right to a home, a resting-place. If the hardened character of the criminal makes his reform an impossibility, and renders him so dangerous to the community that he cannot be allowed to live as other men do, he may be permanently confined for life as a punishment of the third, fifth, or other successive commission of the offense; he may be placed under police surveillance, as is the custom in Europe, and he may be compelled, by the enforcement or the vagrant laws, to engage in some lawful occupation. But it is impossible to punish him, as for a distinct offense, for being what is the necessary consequence of those criminal acts, which have been already expiated by the infliction of the legal punishment.

But the laws have been generally sustained, wherever their constitutionality has been brought into question. In criticising the objection just made, the Supreme Court of Ohio say: "The only limitations to the creation of offenses by the legislative power are the guarantees contained in the bill of rights, neither of which is infringed by the statute in question. It is a mistake to suppose that offenses must be confined to specific acts of commission or omission. A general course of conduct or mode of life, which is prejudicial to the public welfare, may likewise be prohibited and punished as an offense. Such is the character of the offense in question. * * * At common law a common scold was indictable; so also a common barrator; and, by various English statutes, summary proceedings were authorized against idlers, vagabonds, rogues, and other classes of disorderly persons.1 In the several States in this country similar offenses are created. In some of the States it is made an offense to be a common drunkard, a common gambler, a common thief, each State defining the offenses according to its own views of public policy. * * * In such cases the offense does not consist of particular acts, but in the mode of life, the habits and practices of the accused in respect to the character or traits which it is the object of the statute creating the offense to suppress."2 A practical difficulty in enforcing such laws would arise in determining what kind of evidence, and how much, it was necessary to convict one of being a common or habitual criminal. Conceding the constitutionality of the law which makes habitual criminality a distinct punishable offense, the position assumed by the Kentucky court, in respect to the quality and character of the evidence needed to procure a conviction under the law, cannot be questioned. The court say: "It is the general course of conduct in pursuing the business or practice of unlawful gaming, which constitutes a *common gambler.* As a man's character is no doubt formed by, and results from, his habits and practices; and we may infer, by proving his character, what his habits and practices have been. But we do not know any principle of law,

which sanctions the introduction of evidence to establish the character of the accused, with a view to convict him of offending against the law upon such evidence alone. If the statute had made it penal to possess the character of a common gambler, the rejected testimony would have been proper. But we apprehend that the question whether a man is, or is not, a common gambler, depends upon matters of fact—his practices, and not his reputation or character; and, therefore, the facts must be proved, as in other cases.

"The attorney for the Commonwealth offered to prove by a witness, that the accused 'had played at cards for money,' since February, 1833, and before the finding of the indictment. The court rejected the evidence, and we think erroneously. How many acts there were, of playing and betting, or the particular circumstances attending each, cannot be told, inasmuch as the witness was not allowed to make his statement. Every act, however, of playing and betting at cards, which the testimony might establish, would have laid some foundation on which the venire could have rested, in coming to the conclusion, whether the general conduct and practices of the accused did, or did not, constitute him a *common gambler.* One, or a few acts of betting and playing cards, might be deemed insufficient, under certain circumstances, to establish the offense. For instance, if the accused, during the intervals between the times he played and bet, was attending to some lawful business, his farm, his store, or his shop, it might thereby be shown that his playing and betting were for pastime and amusement merely. Under such circumstances the evidence might fail to show the accused was a common gambler. Thus, while many acts of gaming may be palliated, so as to show that the general conduct and practices of an individual are not such as to constitute him a *common gambler;* on the other hand, a single act may be attended with such circumstances as to justify conviction. For example, if an individual plays and bets, and should at the time display all the apparatus of an open, undisguised, common gambler, it would be competent for the jury, although he was an entire stranger, to determine that he fell within the provisions of the statute. The precise nature of the acts which the testimony would have disclosed, had it been heard, is unknown; but we perceive enough to convince us that it was relevant and ought to have been heard.

"The attorney for the Commonwealth offered to prove by a witness, that the accused had, within the period aforesaid, set up and kept faro banks and other gaming tables, at which money was bet, and won and lost, at places without the county of Fayette, where the indictment was found; and the court excluded the testimony. In this the court clearly erred. It makes no difference where the gaming takes place. If a person has gamed until he is a common gambler, without the county of Fayette, he may go to that county for the purpose of continuing his practices. In such a case it was the object of the statute to arrest him as soon as possible by conviction, and requiring the bond provided for in the sixth section of the act of 1833. The testimony should have been admitted."[1]

Another phase of police supervision is that of photographing alleged criminals, and sending copies of the photograph to all detective bureaus. If this be directed by the law as punishment for a crime of which the criminal stands convicted, or if the man is in fact a criminal, and the photograph is obtained without force or compulsion, there can be no constitutional or legal objection to the act; for no right has been violated.

But the practice is not confined to the convicted criminals. It is very often employed against persons who are only under suspicion. In such a case, if the suspicion is not well founded, and the suspected person is in fact innocent, such use of his photograph would be a libel, for which every one could be held responsible who was concerned in its publication. And it would be an actionable trespass against the right of personal security, whether one is a criminal or not, to be compelled involuntarily to sit for a photograph to be used for such purposes, unless it was imposed by the statutes as a punishment for the crime of which he has been convicted.

In the city of New York, Manhattan Borough, the Police Department have from time to time employed, what may be called extra-legal, measures in the prevention of crime; and public opinion seems to have justified them in consideration of the undoubted worthy end in view, and the successful attainment of that end. One of these measures is on occasions, when large crowds are expected to assemble to celebrate some event, or to witness some pageant, to arrest and detain in prison, during such celebration or assembly of an unusual multitude, all known crooks and disorderly or criminal people. These are then charged with vagrancy and either punished or discharged at the discretion of the magistrate, before whom they are subsequently brought. So far as these people may be lawfully charged with vagrancy, their arrest and detention may be lawful; but beyond that, there is no authority in law for such police action.

Another police regulation in New York City is similar to that which has just been explained, except that it is a permanent regulation. In a section of Manhattan, extending south of Fulton street, and east of Broadway, in which millions of portable property are held and stored, and in which most of the large banks and safe deposit vaults are located, any known crook, thief or burglar is arrested on sight; it matters not how peaceable and law abiding his actions may be at the time. These streets are known among the criminal classes as the “dead line,” which they dare not cross except under the penalty of immediate arrest by some one of the secret detectives who patrol that section.

These are the only modes of police supervision of habitual criminals which the American law permits. But on the continent of Europe, it seems that the court may, even in cases of acquittal of the specific charge, under certain limitations which vary with each statute, subject an evil character after his discharge to the supervision and control of the police. Such persons are either confined within certain districts, or are prohibited from residing in certain localities. They are sometimes compelled to report to certain police officers at stated times, and other like provisions for their control are made. This police supervision lasts during life, or for some stated period which varies with the gravity of the offense and the number of offenses which the person under supervision has committed. Similar regulations have been established in England, by “The Habitual Criminal Act.”[1]

As a punishment for crime, there can be no doubt of the power of the legislature to institute such police regulations, unless the length of time, during which the convicted criminal is kept under surveillance, would expose the regulation to the constitutional objection of being a cruel and unusual punishment. But to enforce such a regulation in

any other manner, or under any other character, than as a punishment for a specific crime, would clearly be a violation of the right of personal liberty, not permitted by the constitution.

Police supervision of prostitutes, so universal a custom in the European cities, is sometimes considered in the same light, but is essentially different. Prostitution is an offense against the law, and the prostitute is held to be clearly subject to the penalties of the criminal law;2 and these city ordinances render lawful the practice by authorizing its prosecution under certain limitations and restrictions, among which are police supervision and inspection. But the subjection to this control is voluntary on the part of the prostitute, in order to render practices lawful which are otherwise unlawful. It is rather in the character of a license, under certain restraints, to commit an offense against public morality

[Back to Table of Contents]

§ 52.

State Control Of Minors.—

It is not proposed to discuss in this connection the power of the State to interfere with the parent's enjoyment of his natural right to the care and education of his minor child. The regulation of this relative right will be explained in a subsequent section.1 Here we shall make reference only to the power of the State to take into its care and custody the young children who have been robbed by death of parental care, and but for State interference would be likely to suffer want, or at least to grow up in the streets, without civilizing influences, and in most cases to swell the vicious and criminal classes. There can be no doubt that, in the capacity of a *parens patriæ,* the State can, and should, make provision for the care and education of these wards of society, not only for the protection of society, but also for the benefit of the children themselves. The State owes this duty to all classes, who from some excessive disability are unable to take care of themselves. It is clear, as has already been stated, and explained in several connections, the State has no right to force a benefit upon a full grown man, of rational mind, against his will. But the minor child is not any more capable of determining what is best for himself than a lunatic is. Being, therefore, devoid of the average mental powers of an adult, he is presumed to be incapable of taking care of himself, and the State has the right, in the absence of some one upon whom the law of nature imposes this duty, to take the child in custody, and provide for its nurture and education. This subjection to State control continues during minority.

Now, there are two ways in which the State can interfere in the care and management of a child without parental care. It can either appoint some private person as guardian, into whose custody the child is placed, or it may direct him to be sent to an orphan asylum or reformatory school, especially established for the education and rearing of children who cannot be otherwise cared for. The right of the State to interfere in either way has never been disputed, but a serious and important question has arisen as to the necessary formalities of the proceedings, instituted to bring such children under the control of the State. As already explained, the constitution provides, in the most general terms, that no man shall be deprived of his liberty, except by due process of law. Of course, minors are as entitled to the benefit of this constitutional protection as any adult, within, what must necessarily be supposed to have been, the intended operation of this provision. In the nature of things, we cannot suppose the authors of this provision to have intended that, before parents could exercise control over their minor children, and restrain them of their liberty, they would be compelled to apply to a court for a decretal order authorizing the restraint. The law of nature requires the subjection of minors to parental control, and we therefore conclude that "the framers of the constitution could not, as men of ordinary prudence and foresight, have intended to prohibit [such control] in the particular case, notwithstanding the language of the prohibition would otherwise include it."1 The subjection of minors to control being a natural and ordinary condition, when it is clearly established that the State, as

parens patriæ, succeeds to the parent's rights and duties, in respect to the care of the child, due process of law would be no more necessary to support the assumption of control by the State than it is necessary to justify the parental control. The child is not deprived of a natural right, and hence he is not deprived of his liberty in any legal sense of the term. In a late case the Supreme Court of Illinois has, in an opinion exhibiting considerable warmth of feeling, declared that an adjudication is necessary before the child can be deprived of its natural liberty.1

This is really only a *dictum* of the court so far as it affirms the right of a child to a trial, before the State can place him under restraint, for in this case the boy was taken from the custody of his father, and the real question at issue was whether the State had a right to interfere with the father's control of the boy. This aspect of the question will be presented subsequently.1 The following calm, dispassionate language of the Supreme Court of Ohio commends itself to the consideration of the reader. It was a case of committal to reformatory school on an *ex parte* examination by the grand jury, of a boy under sixteen, who had been charged with crime, under statutes which authorize and direct the proceeding:—

"The proceeding is purely statutory; and the commitment, in cases like the present, is not designed as a punishment for crime, but to place minors of the description, and for the causes specified in the statute, under the guardianship of the public authorities named, for proper care and discipline, until they are reformed, or arrive at the age of majority. The institution to which they are committed is a school, not a prison, nor is the character of this detention affected by the fact that it is also a place where juvenile convicts may be sent, who would otherwise be condemned to confinement in the common jail or penitentiary. * * * Owing to the *ex parte* character of the proceeding, it is possible that the commitment of a person might be made on a false and groundless charge. In such a case neither the infant nor any person who would, in the absence of such commitment, be entitled to his custody and services, will be without remedy. If the remedy provided in the twentieth section should not be adequate or available, the existence of a sufficient cause for the detention might, we apprehend, be inquired into by a proceeding in *habeas corpus.*"1

[Back to Table of Contents]

CHAPTER VI.

REGULATIONS OF THE RIGHTS OF CITIZENSHIP AND DOMICILE.

[Back to Table of Contents]

§ 53.

Citizenship And Domicile Distinguished.—

The distinction between citizenship and domicile has been so often explained in elementary treatises that only a passing reference will be needed here, in order to refresh the memory of the reader. Mr. Cooley defines a citizen to be "a member of the civil state entitled to all its privileges."1 Mr. Blackstone's definition of allegiance, which is the obligation of the citizen, is "the tie which binds the subject to the sovereign, in return for that protection which the sovereign affords the subject."2 Citizenship, therefore, is that political *status* which supports mutual rights and obligations. The State, of which an individual is a citizen, may require of him various duties of a political character; while he is entitled to the protection of the government against all foreign attacks, and is likewise invested with political rights according to the character of the government of the State, the chief of which is the right of suffrage.

Domicile is the place where one permanently resides. One's permanent residence may be, and usually is, in the country of which he is a citizen, but it need not be, and very often is not. One can be domiciled in a foreign land. While a domicile in a foreign State subjects the individual and his personal property to the regulation and control of the law of the domicile, *i. e.,* creates a local or temporary allegiance on the part of the individual to the State in which he is resident, and although he can claim the protection of the laws during his residence in that State, he does not assume political obligations or acquire political rights, and can not claim the protection of the government, after he has taken his departure from the country. Only a citizen can claim protection outside of the country.

There is no permanent tie binding the resident alien to the State, and there is no permanent obligation on the part of either. The individual is at liberty to abandon his domicle, whenever he so determines, without let or hindrance on the part of the State, in which he has been resident. This is certainly true of a domicile in a foreign country.

[Back to Table of Contents]

§ 54.

Expatriation.—

But it has been persistently maintained by the European powers, until within the last twenty years, that the citizen cannot throw off his allegiance, and by naturalization become the citizen of another country. The older authorities have asserted the indissolubility of the allegiance of the natural-born subject to his sovereign or State. Mr. Blackstone says, "it is a principle of universal law that the natural-born subject of one prince cannot by any act of his own, no, not by swearing allegiance to another, put off or discharge his natural allegiance to the former; for this natural allegiance was intrinsic and primitive, and antecedent to the other; and cannot be divested without the concurrent act of the prince to whom it was due."1 Although all the States of Europe have provided for the naturalization of aliens, they have uniformly denied to their own subjects the right of expatriation. But when emigration to this country became general, this right was raised to an international question of great importance, and in conformity with their own interests and their general principles of civil liberty, the United States have strongly insisted upon the natural and absolute right of expatriation. This question has been before the courts of this country,2 and at an early day the Supreme Court of the United States showed an inclination to take the European view of this right.3 But the question has been finally settled in favor of the right of expatriation, so far at least as the government of the United States is concerned, by an act of Congress in the following terms:—

"Whereas, the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty and the pursuit of happiness; and, whereas, in the recognition of this principle, this government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed, that such American citizens, with their descendants, are subjects of foreign States, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed; therefore, be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, that any declaration, instruction, opinion, order or decision of any officer of this government, which denies, restricts, impairs or questions the right of expatriation is hereby declared inconsistent with the fundamental principles of this government."1

The United States government has actively sought the establishment of treaties with other countries, in which the absolute right of expatriation is unqualifiedly recognized; and such great success has attended these efforts, that expatriation may now be asserted to be a recognized international right, which no government can deny.2

[Back to Table of Contents]

§ 55.

Naturalization.—

In order that one may expatriate himself, he must, by naturalization, become the citizen of another State. International law does not recognize the right to become a cosmopolitan. But because expatriation is recognized as a right indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness, and which cannot be abridged or denied to any one, it does not follow that one has a natural and absolute right to become the citizen of any State which he should select. A State has as absolute a right to determine whom it shall make citizens by naturalization, as the individuals have to determine of what State they will be citizens. Citizenship by birth within the country does not depend upon the will of society. By a sort of inheritance the natural-born citizen acquires his right of citizenship. But when a foreigner applies for naturalization, his acquisition of a new citizenship depends upon the agreement of the two contracting parties.

The State, therefore, has the unqualified right to deny citizenship to any alien who may apply therefor, and the grounds of the objection cannot be questioned. The alien has no political rights in the State, and he cannot attack the motive of the State in rejecting him.

[Back to Table of Contents]

§ 56.

Prohibition Of Emigration.—

Political economy teaches us that national disaster may ensue from an excessive depopulation of the country. When the population of a country is so small that its resources can not be developed, it is an evil which emigration in any large degree would render imminent; and the temptation would, under such circumstances, be great to prohibit and restrain the emigration to other lands, while the impulse would increase in proportion to the growth of the evil of depopulation. Has the State the right to prohibit emigration, and prevent it by the institution of the necessary police surveillance? It cannot be questioned that the State may deny the right of emigration to one who owes some immediate service to the State, as for example in the case of war when one has been drafted for the army, or where one under the laws of the country is bound to perform some immediate military service.1 But it would seem, with this exception, that the natural and unrestricted right of emigration would be recognized as a necessary consequence of the recognition of the right of expatriation. If expatriation is indispensable to the enjoyment of the rights of life, liberty and the pursuit of happiness, the right of emigration must be more essential; for expatriation necessarily involves emigration, although emigratiom may take place without expatriation. But this right of prohibition was once generally claimed and exercised and Russia still exercises the right.2

[Back to Table of Contents]

§ 57.

Compulsory Emigration.—

General want and suffering may be occasioned by overpopulation. Indeed, according to the Malthusian theory, excessive population is the great and chief cause of poverty. From the standpoint of public welfare, it would seem well for the State to dedermine how many and who, should remain domiciled in the country, in order that the population may be regulated and kept within the limits of possible well-being, and transport the excess of the population to foreign uninhabited lands, or to other parts of the same country, which are more sparsely settled. But from the standpoint of the individual and of his rights, this power of control assumes a different aspect. If government is established for the benefit of the individual, and society is but a congregation of individuals for their mutual benefit; once the individual is recognized as a part of the body politic, he has as much right to retain his residence in that country as his neighbor; and there is no legal power in the State to compel him to migrate, in order that those who remain may have more breathing space. Let those emigrate who feel the need of more room.

Another cause of evil, which prompts the employment of the remedy of compulsory emigration, would be an ineradicable antagonism serious enough to cause or to threaten social disorder and turmoil. Can the government make a forced colonization of one or the other of the antagonistic races? This is a more stubborn evil than that which arises from excessive population; for want, especially when the government offers material assistance, will drive a large enough number out of the country to keep down the evil. The only modern case of forcible emigration, known to history, is that of the Acadians. Nova Scotia was originally a French colony and when it was conquered by the British, a large non-combatant population of French remained, but refused to take the oath of allegiance. The French in the neighboring colonies kept up communication with these French inhabitants of Nova Scotia and, upon the promise to recapture the province, incited them to a passive resistance of the British authority. The presence of such a large hostile population certainly tended to make the British hold upon Nova Scotia very insecure, and the English finally compelled these French people to migrate. While the circumstances tend to mitigate the gravity of this outrage upon the rights of the individual, the act has been universally condemned.[1] The State has no right to compel its citizens to emigrate for any cause, except as a punishment for crime. It may persuade and offer assistance, but it cannot employ force in effecting emigration, whatever may be the character of the evil, which threatens society, and which prompts a compulsory emigration of a part of its population.

But it does not follow from this position that the State has not the right to compel the emigration of residents of the country, who are not citizens. The obligation of the State to resident aliens is only temporary, consists chiefly in a guaranty of the protection of its laws, as long as the residence continues, and does not deprive the State of the power to terminate the residence by their forcible removal. They can be

expelled, whenever their continued residence for any reason becomes obnoxious or harmful to the citizen or to the State.

Although the aborigines of a country may not, under the constitutional law of the State, be considered citizens,[1] they are likewise not alien residents and cannot be expelled from the country, or forcibly removed from place to place, except in violation of individual liberty. But the treatment offered by the United States government to the Indians would indicate that they have reached a different conclusion. The forcible removal of the Indians from place to place, in violation of the treaties previously made with them,—although there is a pretense that the treaties have become forfeited on account of their wrongful acts,—differs in character but little from the expulsion of the Acadians, for whose sufferings the world felt a tender sympathy.

[Back to Table of Contents]

§ 58.

Prohibition Of Immigration.—

Since the State owes no legal duty to a foreigner, and the foreigner has no legal right to a residence in a country of which he is not a citizen, a government may restrain and even absolutely prohibit immigration, if that should be the policy of the State. The policy of each State will vary with its needs. In this country, the need of immigration has been so great that we offer the greatest possible inducements to immigrants, to settle in our midst. So general and unrestricted has immigration been in the past, that a large class of our people have denied the right to refuse ingress to any foreigner, unless he is a criminal. As a sentiment, in conformity with the universal brotherhood of man, this position may be justified; but, as a living legal principle, it cannot be sustained. The government of a country must protect its own people at all hazards. Races are often too dissimilar to permit of their being brought into harmonious relations with each other under one government; and the presence in the same country of antagonistic races always engenders social and economical disturbances. If they are already citizens of the same country, as, for example, the negroes and the whites of the Southern States, there is no help for the evil but a gradual solution of the problem by self-adaptation to each other, or a voluntary exodus of the weaker race. But when an altogether dissimilar race seeks admission to the country, not being citizens, the State may properly refuse them the privilege of immigration. And this is the course adopted by the American government towards the Chinese who threaten to invade and take complete possession of the Pacific coast. After making due allowance for the exaggerations of the evil, there can be no doubt that the racial problem, involved in the Chinese immigration, was sufficiently serious to justify its prohibition. The economical problem, arising from a radical difference in the manners and mode of life of the Chinese, not to consider the charges of their moral depravity, threatened to disturb the industrial and social conditions of those States, to the great injury of the native population. It was even feared that the white population, not being able to subsist on the diet of the Chinese, and consequently being unable to work for as low wages, would be forced to leave the country; and as they moved eastward; the Chinese would take their place, until finally the whole country would swarm with the almond-eyed Asiatic. Self-preservation is the first law of nature, with States and societies, as with individuals. It can not be doubted that the act of Congress, which prohibited all future Chinese immigration, was within the constitutional powers of the United States.

A number of decisions have been rendered under the Chinese Exclusion Act, in all of which the constitutionality of the act has been sustained. In the case of In re Chae Chan Ping,[1] the petitioner had been in this country and had departed prior to the enactment of the exclusion act, with a certificate of identification provided for by the prior law. The exclusion act expressly prohibits re-entry of such a person, who had not returned prior to the enactment of the exclusion act. The court say:—

"The certificate, it is urged, is a contract entered into between the United States and the petitioner in pursuance of the restriction act, which vests him with a right that cannot now be divested under the general principles of public justice, even though the constitutional provision against passing laws impairing the obligations of contracts is in terms only restrictive upon the States. We think this is not the correct view. There is no contract between the United States and individual Chinese laborers at all. The Chinese laborers obtain no rights under the acts of Congress beyond what is secured to them by the treaties. There is no consideration moving from them, individually or collectively, under the act of Congress, upon which a contract was founded. All the rights they have are derivative, namely, merely resting upon the stipulations of the treaty between the two governments, which are the contracting, and only contracting, parties. * * * The certificates are instruments of evidence, issued to afford convenient proof of the identity of the party entitled to enjoy the privileges secured by the treaties, and to prevent frauds, and they are so designated in the act. * * * To call these acts and certificates provided in pursuance thereof a contract would be an abuse of language. As between the two governments treaties are laws, and they confer rights and privileges as long as they are in force; and doubtless some rights accrue and become indefeasibly vested by covenants or stipulations that have ceased to be executory and have become fully executed, as in the case of title to property acquired thereunder. But we do not regard the privilege of going and coming from one country to another as one of this class of rights. The being here with the right of remaining is one thing, but voluntarily going away with a right at the time to return is quite another."

In other cases,[1] it was held that the Chinese Exclusion Act of Congress of 1892, was not unconstitutional, in that it provided that the person charged with the violation of the act is to be presumed guilty, *i. e.,* of being unlawfully in this country, without the presentation of any evidence against him, until he established his innocence or right to be in this country by affirmative evidence. The reason which was assigned for justifying this departure from the common law in respect to the burden of proof in criminal cases, is that the facts which constitute a defense are peculiarly within the knowledge of the person charged.[1]

The United States government have also instituted police regulations for the purpose of preventing pauper immigration, and when an immigrant is without visible means of support, the steamship company which transported him is required to take him back. The purpose of these regulations itself suggests the reasons that might be advanced in justification of them, and, therefore, no statement of them is necessary.

[Back to Table of Contents]

§ 59.

The Public Duties Of A Citizen.—

In return for the protection guaranteed to the citizen, he is required to do whatever is reasonable and necessary in support of the government and the promotion of the public welfare. It will not be necessary to enter into details, for these duties vary with a change in public exigencies. The object of taxation is treated more particularly in a subsequent section.2 The ordinary public duties of an American citizen are to assist the peace officers in preserving the public order and serving legal processes, and to obey all commands of the officers to aid in the suppression of all riots, insurrections and other breaches of the peace; to serve as jurors in the courts of justice, to perform military service in time of peace, as well as in war. It is common for the States to require its male citizens to enroll themselves in the State militia, and to receive instruction and practice in military tactics; and in time of war there can be no doubt of the power of the government to compel a citizen to take up arms in defense of the country against the attacks of an enemy, in the same manner as it may require the citizen to aid in suppressing internal disorders.3 At an earlier day, it was also a common custom to require of the citizens of a town or city the duty of assisting in the quenching of accidental fires and the prevention of conflagrations; and in some of the States (notably South Carolina) every male citizen, between certain ages, was at one time required to be an active member of a militia or fire company.1

It was also at one time the common duty of a citizen to perform, or supply at his expense, labor upon the public roads, in order to keep them in repairs.2 But this specific duty is each day becoming more uncommon, and the repairs are being made by employees of the State or municipal community, whose wages are paid out of the common fund. Indeed, the general tendency at the present day is to relieve the citizen of the duty of performing these public duties by the employment of individuals, who are specially charged with them, and perform them as a matter of business. Even in regard to the matter of military service in time of war this tendency is noticeable. Whenever a draft is made by the government for more men, and one whose name is found in the list desires to avoid the personal performance of this public duty, he is permitted to procure a substitute. The duty of acting as juror is about the only public duty, whose performance is still required to be personal, and even that is somewhat in danger of substitutive performance. The flimsy and unreasonable excuses, too often given and received for discharge from jury duty, are fast paving the way to the appointment of professional jurymen.

[Back to Table of Contents]

CHAPTER VII.

STATE REGULATION OF MORALITY AND RELIGION.

[Back to Table of Contents]

§ 60.

Crime And Vice Distinguished—Their Relation To Police Power.—

In legal technics, crime is any act which involves the violation of a public law, and which by theory of law constitutes an offense against the State. Crimes are punished by means of prosecution by State officers. When an act violates some private right, and it is either so infrequent, or so easily controlled by private or individual prosecutions, that the safety of society does not require it to be declared a crime, and the subject of a criminal prosecution, it is then denominated a *trespass,* or tort. The same act may be both a tort and a crime; and with the exception of those crimes which involve the violation of strictly public rights, such as treason, malfeasance in office, and the like, all crimes are likewise torts. The same act works an injury to the State or to the individual whose right is invaded, and according as we contemplate the injury to the State or to the individual, the act is a crime or a tort. The injury to the State consists in the disturbance of the public peace and order. The injury to the individual consists in the trespass upon some right. But, from either standpoint, the act must be considered as an infringement of a right. The act must constitute an *injuria, i. e.,* the violation of a right.

The distinction, thus given, between a crime and a tort is purely technical, and proceeds from the habit of the common-law jurist to account for differences in legal rules and regulations by fictitious distinctions, which were in fact untrue. There is no essential difference between a crime and a tort, except in the remedy. No act can be properly called, either a crime or a tort, unless it be a violation of some right; and with the exception of those crimes, which consist in the violation of some public right, such as treason, crimes are nothing more than violations of private rights, which are made the subject of public prosecution, because individual prosecution is deemed an ineffectual remedy. The idea of an injury to the State, as the foundation for the criminal prosecution is a pure fiction, indulged in by the jurists in order to conform to the iron cast maxim, that no one but the party injured can maintain an action against the wrong-doer. A crime, then, is a trespass upon some right, public or private, and the trespass is sought to be redressed or prosecuted, whether the remedy be a criminal prosecution or a private suit.

A vice, on the other hand, consists in an inordinate, and hence immoral, gratification of one's passions and desires. The primary damage is to one's self. When we contemplate the nature of a vice, we are not conscious of a trespass upon the rights of others. If the vice gives rise to any secondary or consequential damage to others, we are only able to ascertain the effect after a more or less serious deliberation. An intimate acquaintance with sociology reveals the universal interdependence of individuals in the social state; *no man liveth unto himself,* and no man can be addicted to vices, even of the most trivial character, without doing damage to the material interests of society, and affecting each individual of the community to a greater or less

degree. But the evils to society, flowing from vices, are indirect and remote and do not involve trespasses upon rights. The indolent and idle are actual burdens upon society, if they are without means of support, and in any event society suffers from them because they do not, as producers, contribute their share to the world's wealth. We may very well conceive of idleness becoming so common as to endanger the public welfare. But these people are not guilty of the *crime* of indolence; we can only charge them with the *vice* of idleness.

Now, in determining the scope of police power, we concluded that it was confined to the imposition of burdens and restrictions upon the rights of individuals, in order to prevent injury to others; that it consisted in the application of measures for the enforcement of the legal maxim, *sic utere tuo, ut alienum non lædas.* The object of police power is the prevention of crime, the protection of rights against the assaults of others. The police power of the government cannot be brought into operation for the purpose of exacting obedience to the rules of morality, and banishing vice and sin from the world. The moral laws can exact obedience only *in foro conscientiæ.* The municipal law has only to do with trespasses. It cannot be called into play in order to save one from the evil consequences of his own vices, for the violation of a right by the action of another must exist or be threatened, in order to justify the interference of law. It is true that vice always carries in its train more or less damage to others, but it is an indirect and remote consequence; it is more incidental than consequential. At least it is so remote that very many other causes co-operate to produce the result, and it is difficult, if not impossible, to ascertain which is the controlling and real cause.1 Because of this uncertainty, and practical inability to determine responsibility, it has long been established as the invariable rule of measuring the damages to be recovered in an action for the violation of a right, that only the proximate and direct consequences are to be considered. *In jure non remota causa, sed proxima spectatur.* If this is a necessary limitation upon the recovery of damages where a clearly established legal right is trespassed upon, there surely is greater reason for its application to a case where there is no invasion of a right, in a case of *damnum absque injuria.* It is apparently conceded by all, that vice cannot be punished unless damage to others can be shown as accruing or threatening. It cannot be made a legal wrong for one to become intoxicated in the privacy of his room, when the limitation upon his means did not make drunkenness an extravagance. If he has no one dependent upon him, and does not offend the sensibility of the public, by displaying his intoxication in the public highways, he has committed no wrong, *i. e.,* he has violated no right, and hence he cannot be punished.1 When, therefore, the damage to others, imputed as the cause to an act in itself constituting no trespass, is made the foundation of a public regulation or prohibition of that act, it must be clearly shown that the act is the real and predominant cause of the damage. The intervention of so many co-operating causes in all cases of remote damage makes this a practical impossibility. Certainly, the act itself cannot be made unlawful, because in certain cases a remote damage is suffered by others on account of it.

It may be urged that this rule for the measurement of damages may be changed, and the damages imputed to the remotecause, without violating any constitutional limitation, and such has been the ruling of the New York Court of Appeals.1

If this rule rested purely upon the will of the governing power; if it was itself a police regulation, instituted for the purpose of preventing excessive and costly litigation, its abrogation would be possible. But it has its foundation in fact. It is deduced from the accumulated experience of ages, that the proximate cause is always the predominant in effecting the result; it is a law of nature, immutable and unvarying.1 The abrogation of this rule violates the constitutional limitation "no man shall be deprived of his life, liberty or property, except by due process of law," when in pursuance thereof one is imprisoned or fined for a damage which he did not in fact produce. The inalienable right to "liberty and the pursuit of happiness" is violated, when he is prohibited from doing what does not involve a trespass upon others.

In order, therefore, that vices may be subjected to legal control and regulation, it will be necessary to show that it constitutes a trespass upon some one's rights, or proximately causes damage to others, and that is held to be a practical impossibility. Under the established rules of constitutional construction, it is quite probable that proximate damage, without trespass upon rights, may be made actionable, and the vice which causes it to be prohibited, without infringing the constitution; but the further practical difficulty is to be met and avoided, that a trespass upon one's rights, or the threatening danger of such a trespass, is necessary to procure from the people that amount of enthusiastic support, without which a law becomes a dead letter. It is the universal experience that laws can not be enforced which impose penalties upon acts which do not constitute infringements upon the rights of others. But this is not a constitutional objection, and does not affect the binding power of the law, if a sufficient moral force can be brought together to secure its enforcement. This is a question of expediency, which can only be addressed to the discretion of the legislature.

The courts have not indorsed the principles which have been set forth in this section, on which the distinction here made, between vice and crime, rests, and which deny to the government the power to punish vice as vice. Profanity is punished; rightly when it is indulged in on the streets, and in other public places. But the Arkansas statute on profanity does not confine the offense to swearing in public.1 The keeping of disorderly houses and places of gambling is, of course, prohibited, because it is making a business of pandering to vices; and, for that reason, comes properly within the jurisdiction of the police power.2 But the prohibitive law in such cases is not now confined to the offense of providing the means of indulgence in vice. It makes the indulgence in these vices itself a criminal misdemeanor. Thus, it is made a criminal misdemeanor for one to visit a house of ill-fame.3 And the statutes even go farther, and make the vice of fornication a criminal offense.4

The social vice, of course, involves an injury to society, of a strikingly strong character, in that it makes probable an increase of the public burden by the birth of illegitimate children, as well as it is the occasion of a wrong to the children so born. For, under the long existing legal and social distinction between legitimate and illegitimate children, parents can be properly charged with the commission of a trespass upon the reasonable rights of their children, when they bring them into the world under the stigma of illegitimacy. The punishment of those who indulge in the social vice is justifiable on these grounds, and is properly distinguished from such

strictly personal vices, involving no trespass upon the rights of others, such as drunkenness. But the distinction is not always recognized.

It is true that, generally, gambling is not a punishable offense, when it is practiced in the confines of a private residence.1 And it has been held that a private room in a hotel or inn is not a public place, so that a game of poker, played in such a room with the door locked, would not be a punishable offense.2 But in California, the poor Chinaman cannot indulge, even in private, in his favorite game of "tan."3 And in some of the States, betting on the elections, indulged in anywhere, is made a criminal offense;4 while, in Illinois and Missouri, gambling in stocks or produce brings one within the condemnation of the criminal law.5

But, ordinarily, the punishment of gambling is confined to cases which take place in some public place, or in a regular gambling saloon. Most of the statutes make the fact of gambling in a public place the only punishable offense, and this fact is required to be established against each defendant.6 But in two of the States, at least, it is a criminal offense to visit a public gambling house.1

[Back to Table of Contents]

§ 61.

Sumptuary Laws.—

Of the same general character, as laws for the correction of vices, are the sumptuary laws of a past civilization. Extravagance in expenditures, the control of which was the professed design of these laws, was proclaimed to be a great evil, threatening the very foundations of the State; but it is worthy of notice that in those countries and in the age in which they were more common, despotism was rank; and the common people were subjected to the control of these sumptuary laws, in order that by reducing their consumption they may increase the sum of enjoyment of the privileged classes. The diminution of their means of luxuriant living was really the danger against which the sumptuary laws were directed. In proportion to the growth of popular yearning for personal liberty, these laws have become more and more unbearable, until now it is the universal American sentiment, that these laws, at least in their grosser forms, and hence on principle, are violations of the inalienable right to "liberty and the pursuit of happiness," and involve a deprivation of liberty and property—through a limitation upon the means and ways of enjoyment—without due process of law. Judge Cooley says: "The ideas which suggested such laws are now exploded utterly, and no one would seriously attempt to justify them in the present age. The right of every man to do what he will with his own, not interfering with the reciprocal right of others, is accepted among the fundamentals of our law."2 It is true that a public and general extravagance in the ways of living would lead to national decay. Nations have often fallen into decay from the corruption caused by the individual indulgence of luxurious tastes. But this damage to others is very remote, if it can be properly called consequential, and in any event of its becoming a widespread evil, the nation would be so honeycombed with corruption that the means of redemption, or regeneration, except from without, would not be at hand. The enforcement of the laws could not be secured. The inability to secure a reasonable enforcement of a law is always a strong indication of its unconstitutionality in a free State.

Public sentiment in the United States is too strong in its opposition to all laws which exert an irksome restraint upon individual liberty, in order that sumptuary laws in their grosser forms may be at all possible. But as far as the liquor prohibition laws have for their object the prevention of the consumption of intoxicating liquors, they are sumptary laws, and are constitutionally objectionable on that ground, if the measures are not confined to the prohibition of the sale of liquors. This is the usual limitation upon the scope of the prohibition laws. But it is said that in the States of Wisconsin and Nevada laws have been enacted by the Legislature, prohibiting the act of "treating" to intoxicating drinks, making it a misdemeanor, and punishable by fine or imprisonment. There is probably very little doubt that a large proportion of the intemperance among the youth of this country may be traced to this peculiarly American custom or habit or "treating." But inasmuch as the persons, who are directly injured—and this is the only consequential injury which can be made the subject of legislation—are all willing participants, except in the very extreme cases of beastly

intoxication, when one or more of the parties "treated" cannot be considered as rational beings—*volenti non fit injuria*—these regulations are open to the constitutional objection of a deprivation or restraint of liberty, in a case in which no right has been invaded. The manifest inability to secure, even in the slightest degree, an enforcement of these curious experiments in legislation has been their most effective antidote. But while, as a general proposition, we may freely use whatever food or clothing taste or caprice may suggest, without the exercise of any governmental restraint, there are some exceptions to the rule, which will probably be admitted without question. Certainly no one would seriously doubt the constitutionality of the laws, to be found on the statute book of every State, which provide for the punishment of an indecent exposure of the person in the public thoroughfares. Every one can be required to appear in public in decent attire. It is not definitely settled what is meant by indecent attire, but probably the courts would experience no difficulty in reaching the conclusion that any attire is indecent, which left exposed parts of the human body which according to the common custom of the country are invariably covered. It is questionable that the courts can go farther in the requirement of decent attire; as, for example, to prohibit appearance in the streets in what are usually worn as undergarments, provided that the body is properly covered to prevent exposure.

Another phase of police power, in this connection, is the prohibition of the appearance in public of men in women's garb, and *vice versa.* The use of such dress could serve no useful purpose, and tends to public immorality and the perpetration of frauds. Its prohibition is, therefore, probably constitutional. But it does not follow that a law, which prohibited the use by men of a specific article of women's dress, or to women the use of a particular piece of men's clothing, would be constitutional. The prohibition must be confined to those cases, in which immorality or the practice of deception is facilitated, viz., where one sex appears altogether in the usual attire of the other sex.

[Back to Table of Contents]

§ 62.

Church And State—Historical Synopsis.—

Religious liberty, in all its completeness, is a plant of American growth. In no other country, and in no preceding age, was there anything more than religious toleration; and even toleration was not a common experience. Everywhere, the State was made the instrument for the propagation of the doctrines of some one religious sect, and all others were either directly prohibited, or so greatly discriminated against in the bestowal of State patronage, as to amount, in effect, to an actual prohibition. On the other hand, the State would secure the support of the church in the enforcement of its mandates. Before the American era, the gradual development of the human soul, under the workings of the forces of civilization, had long since done away with physical torture. Heretics were not burned at the stake, or put to the rack; but the same cruel intolerance exacted the creation of social and political distinctions, which were equally effective in oppressing those who differed in their religious faith with the majority. Protestant England and Germany oppressed the Catholics, and Catholic France and Italy oppressed the Protestants, while the infidel received mercy and toleration at the hands of neither. Most of the immigrants to the American colonies were refugees from religious oppression, driven to the wilds of America, in order to worship the God of the Universe according to the dictates of their conscience. The Puritans of New England, the Quakers of Pennsylvania, the English Catholics of Maryland and the Huguenots of the Carolinas, sought on this continent that religious liberty which was not to be found in Europe. I should not say “religious liberty,” for that is not what they sought. They desired only to be freed from the restraint of an intolerant and imposing majority. They desired only to settle in a country where the adherents of their peculiar creed could control the affairs of State. Notwithstanding their sad experience in the old world, when they settled in America, they became as intolerant of dissenters from the faith of the majority, as their enemies had been towards them. Church and State were not yet separate. Each colony was dominated by some sect, and the others fared badly. The performance of religious duties was enforced by the institution of statutory penalties. The clergyman, particularly of New England, was not only the shepherd of the soul, but he was likewise, in some sense, a magistrate. “The heedless one who absented himself from the preaching on a Sabbath was hunted up by the tithing man, was admonished severely, and, if he still persisted in his evil ways, was fined, exposed in the stocks or imprisoned in the cage. To sit patiently on the rough board seats, while the preacher turned the hour-glass for the third time, and with his voice husky from shouting, and the sweat pouring in streams down his face, went on for an hour or more, was a delectable privilege. In such a community the authority of the reverend man was almost supreme. To speak disrespectfully concerning him, to jeer at his sermons, or to laugh at his odd ways, was sure to bring down on the offender a heavy fine.”[1] The religious liberty of the colonial period meant nothing more than freedom from religious restraint for the majority, while the minority suffered as much persecution as the immigrants had themselves suffered in Europe, a striking illustration of the accuracy of the doctrine

that there are no worse oppressors than the oppressed; when they have in turn become the ruling class. It is no exaggerated view to take of the probabilities, that the grand establishment of religious liberty of to-day would not have been attained, at least in the present age, if the rapid increase in the number of religious sects, each one of which was predominant in one or more of the colonies, had not militated against the successful union of the colonies into one common country. "In some of the States, Episcopalians constituted the predominant sect; in others, Presbyterians; in others, Congregationalists; in others, Quakers, and in others, again, there was a close numerical rivalry among contending sects. It was impossible that there should not arise perpetual strife and perpetual jealousy on the subject of ecclesiastical ascendency, if the national government were left free to create a religious establishment. The only security was in extirpating the power."[1] Congress was therefore denied by the first amendment to the Constitution of the United States the power to make any law respecting an establishment of religion or prohibiting the free exercise thereof. "Thus, the whole power over the subject of religion is left exclusively to the State governments, to be acted upon according to their own sense of justice and the State constitutions; and the Catholic and Protestant, the Calvinist and the Armenian, the Jew and the infidel, may sit down at the common table of the national councils, without any inquisition into their faith or mode of worship."[2]

Proceeding from this limitation upon the power of the national government to regulate religion, there was ultimately incorporated into the constitutions of almost all of the States a prohibition of all State interference in matters of religion; thus laying the foundation for that development of a complete and universal religious liberty, a liberty enjoyed alike by all, whatever may be their faith or creed. Thus and then, for the first time in the history of the world, was there a complete divorce of church and State. But even with the enactment of the constitutional provisions, religious liberty was not assured to all. Legal discriminations, on account of religious opinions, exist in some of the States to the present day, and public opinion in most American communities is still in a high degree intolerant.[3] The complete abrogation of all State interference in matters of religion is of slow growth, and can only be attained with the growth of public opinion.

[Back to Table of Contents]

§ 63.

Police Regulation Of Religion—Constitutional Restrictions.—

If there were no provisions in the American constitutions especially applicable to the matter of police regulation of religion, the considerations which would deny to the State the control and prevention of vice would also constitute insuperable objections to State interference in matters of religion. But the rivalry and contention of the religious sects not only demanded constitutional prohibition of the interference of the national government, but gave rise to the incorporation of like prohibitions in the various State constitutions. The exact phraseology varies with each constitution, but the practical effect is believed in the main to be the same in all of them. These provisions not only prohibit all church establishments, but also guarantee to each individual the right to worship God in his own way, and to give free expression to his religious views. The prohibition of a religious establishment not only prevents the establishment of a distinctively State church, but likewise prohibits all preferential treatment of the sects in the bestowal of State patronage or aid. A law is unconstitutional which gives to one or more religious sects a privilege that is not enjoyed equally by all.[1] "Whatever establishes a distinction against one class or sect is, to the extent to which the distinction operates unfavorably, a persecution; and if based on religious grounds, a religious persecution. The extent of the discrimination is not material to the principle, it is enough that it creates an inequality of right or privilege."[2]

But while religious establishments and unequal privileges are prohibited, and the State in its dealings with the individual is to know no orthodoxy or heterodoxy, no Christianity or infidelity, no Judaism or Mohammedanism, the law cannot but recognize the fact that Christianity is in the main the religion of this country. While equality, in respect to the bestowal of privileges, is to be strictly observed, the recognition of the prevailing religion, in order to foster and encourage the habit of worship as a State policy, is permissible, provided there is no unnecessary discrimination in favor of any particular sect. It is said that only *unnecessary* discrimination is prohibited. By that is meant that, in the encouragement of religious worship, there is in some cases an unavoidable recognition of the overwhelming prevalence of the Christian religion in this country. The masses of this country, if they profess any religious creed at all, are Christians. Thus, for example, it has long been the custom to appoint chaplains to the army and navy of the United States, and the sessions of Congress and of the State legislatures are usually opened with religious exercises. These chaplains are naturally Christian clergymen. If they were the teachers of any other religion, their public ministrations would fail in the object of their appointment, viz.: the encouragement of religious worship, because such exercises would offend the religious sensibilities and arouse the opposition of the masses, instead of exciting in them a greater desire for spiritual enlightenment. But these regulations can go no further than the institution and maintenance of devotional exercises. If attendance upon these exercises is made compulsory upon the army and

navy, and upon the members of the legislative bodies, there would be a clear violation of the religious liberty of the person who was compelled to attend against his will. The Jew and the infidel cannot be forced to attend them.1

This question has of late years been much discussed in its bearings upon the conduct of religious exercises in the public schools of this country. It has been held that the school authorities may compel the pupils to read the Bible in the schools, even against the objection and protest of the parents.1 But it would appear that this view is erroneous. It is true that the regulation does not constitute such a gross violation of the religious liberty of the child, as it would, if attendance upon the school was compulsory. It is true that the Hebrew or infidel need not attend the public schools, if he objects to the religious exercises conducted there. But such a regulation would amount to the bestowal of unequal privileges, which is as much prohibited by our constitutional law as direct religious proscription. In accordance with the permissible recognition of Christianity as the prevailing religion of this country, it may be permitted of the school authorities to provide for devotional exercises according to the Christian faith, but neither teacher nor pupil can lawfully be compelled to attend.2 All education must be built upon the corner-stone of morality, in order that any good may come out of it to the individual or to society; and an educational course, which did not incorporate the teaching of moral principles, would at least be profitless, if not absolutely dangerous. The development of the mind without the elevation of the soul, only sharpens the individual's wits, and makes him more dangerous to the commonwealth. The teaching of morality is therefore not in any sense objectionable; on the contrary, it should be made the chief aim of the public school system. But religion should be carefully distinguished from morality. The Jew, the Christian, the Chinese, the Mohammedans, the infidels and atheists, all may alike be taught the common principles of morality, without violating their religious liberty. The law exacts an obedience to the more vital and fundamental principles of morality, and the State can as well provide for moral instruction in its public schools. It is its duty to do so. But moral instruction does not necessitate the use of the Bible, or any other recognition of Christianity, and such recognition is unconstitutional, when forced upon an unwilling pupil.

[Back to Table of Contents]

§ 64.

State Control Of Churches And Congregations.—

In the English law of corporations, one of the classifications is into *ecclesiastical* and *lay*. The religious incorporations were called ecclesiastical, and because of the legal recognition and establishment of church and religion, they are possessed of peculiar characteristics, which called for this special classification. But in this country there is no need for it. In conformity with the general encouragement of religious worship, voluntary religious societies are at their request incorporated under the general laws, in order that they may hold and transmit property, and do other necessary acts as a corporate body, which without incorporation would be the joint acts of the individual members, with the general liability of partners. All religious societies are alike entitled to incorporation, and whatever privileges are granted to one society or sect, must be granted to all, in order not to offend the constitutional prohibition.

Upon the incorporation of a religious society, two different bodies, co-existing and composed of the same members, are to be recognized. The religious organization, together with the spiritual affairs of the society, has received no legal recognition and has, in fact, no legal *status,* except as it might affect the temporal affairs and civil rights of the members of the corporation, wherewith it is so intimately bound up that it is difficult at times to trace the line of demarcation. There has been no incorporation of the spiritual organization. Its members have only become incorporators of the religious corporation. While the corporation and the spiritual organization are usually composed of the same members, it is not at all impossible for what appears, to clericals and laymen alike, as a remarkable anomaly to happen, viz.: that some of the members of the corporation are not members of the spiritual corporation, and some members of the latter do not belong to the temporal society. Of course, this is only possible when the organic law of the corporation does not require membership in the spiritual organization, as a condition of membership in the legal incorporation. The law cannot undertake to regulate the religious affairs of the society, or overrule the decisions and actions of the properly constituted authorities of the church in respect to such religious affairs.[1] The creed, articles of faith, church discipline, and ecclesiastical relations generally are beyond State regulation or supervision. “Over the church, as such, the legal or temporal tribunals of the State do not profess to have any jurisdiction whatever, except so far as is necessary to protect the civil rights of others, and to preserve the public peace. All questions relating to the faith and practice of the church and its members belong to the church judicatories to which they have voluntarily subjected themselves.”[2] But whenever the civil and property rights of the individual are invaded, the State is justified and expected to exercise the same control and supervision as it would in the case of any other incorporation.[1] The legal corporations may be established simply upon the basis of a community of property, without introducing any religious qualification as a member,[2] and in that case there is no opportunity whatsoever for State interference in the religious affairs of the organization. But this is not usually the case. Membership in the corporation assumes

ordinarily a more or less religious aspect, and depends upon the performance of certain religious conditions. The civil rights of such a member may, therefore be materially affected by the decisions of the ecclesiastical authorities, and to that extent and for the protection of such civil rights are these decisions on religious matters subject to review. The religious status cannot be determined in any event by a civil court, except as it bears upon and interferes with the temporal or civil rights of the individual. And even then the courts are not permitted to review and determine the essential accuracy of the decision. The court must confine its investigation to ascertaining, whether the proper religious authorities had had cognizance of the case, and had complied with their organic law in the procedure, and how far the decision affects the civil rights under the by-laws and charter of the corporation.[1]

[Back to Table of Contents]

§ 65.

Religious Criticism And Blasphemy Distinguished.—

The recognition of Christianity by the State is not, and need not be, confined to the provision for Christian devotional exercises in the various governmental departments and State institutions, as has been explained and claimed in a preceding section.2 The fostering and encouragement of a worshipful attitude of mind, the development and gratification of the religious instinct, should be of great concern to the State. While morality is distinguishable from religion, the most important principles of morality receive their highest sanction and their greatest efficacy, as a civilizing force, in becoming the requirements of religion. A high morality is inconsistent with a state of chronic irreligiousness. Religiousness is not here employed as a synonym for membership in some established religious body. Deeply religious natures are found outside of such bodies as well as inside. Anything, therefore, that is calculated to diminish the people's religious inclinations is detrimental to the public welfare, and may therefore be prohibited. Public contumely and ridicule of a prevalent religion not only offend against the sensibilities of the believers, but likewise threaten the public peace and order by diminishing the power of moral precepts. Inasmuch, therefore, as Christianity is essentially the religion of this country, any defamation of its founder or of its institutions, as well as all malicious irreverence towards Deity, must and can be prohibited. These acts or offenses are generally comprehended under the name of *blasphemy.*

Mr. Justice Story, in the Girard will case, said that, "although Christianity be a part of the common law of the State, yet it is only so in the qualified sense, that *its divine origin and truth are admitted,* and therefore it is not to be maliciously and openly reviled and blasphemed, against, *to the annoyance of believers or the injury of the public.*"1 The "divine origin and truth" of the Christian religion are not admitted by the common law of this country. The only thing that the law can admit, in respect to Christianity, is its potent influence in carrying on the development of civilization, and more especially in compelling the recognition and observance of moral obligations. If the laws against blasphemy rested upon the admission by the law of the "divine origin and truth" of the Christian religion, they would fall under the constitutional prohibitions, which withdraw religion proper from all legal control. Blasphemy is punishable, because, as already stated, it works an annoyance to the believer and an injury to the public. While religion proper is by the constitutional limitations taken out of the field of legislation, they were "never meant to withdraw religion in general, and with it the best sanctions of moral and social obligation from all consideration and notice of the law. * * * To construe it as breaking down the common-law barriers against licentious, wanton and impious attacks upon Christianity itself, would be an erroneous construction of its (their) meaning."1 But it is only as a moral power that any religion can receive legal recognition. "The common law adapted itself to the religion of the country just so far as was necessary for the peace and safety of civil

institutions; but it took cognizance of offenses against God only when, by their inevitable effects, they became offenses against man and his temporal security."2

The essential element of blasphemy is malicious impiety. "In general, blasphemy may be described as consisting in speaking evil of the Deity with an impious purpose to derogate from the divine majesty, and to alienate the minds of others from the love of and reverence for God. It is purposely using words concerning God, calculated and designed to impair and destroy the reverence, respect and confidence due to Him, as the intelligent Creator, Governor and Judge of the world. It embraces the idea of detraction, when used towards the Supreme Being; as 'calumny' usually carries the same idea when applied to an individual. It is a willful and malicious attempt to lessen men's reverence of God by denying His existence, or His attributes as an intelligent Creator, Governor and Judge of men, and to prevent their having confidence in Him as such."3

The laws against blasphemy, at least in respect to the more special details, have reference solely to Christianity. If their authority rested on the religious character of the offense, the equality of all religion before the law would require that these laws should embrace blasphemy, against whatever religion it may be directed. And while that would be, under our constitutional provisions, both permissible and commendable, since the laws are designed to prevent widespread irreligiousness and disturbance of the public order, there would be no illegal discrimination, if the provisions of the law should in the main be confined to blasphemy against the Christian religion. "Nor are we bound, by any expressions in the constitution, as some have strongly supposed, either not to punish at all, or to punish indiscriminately, the like attacks upon the religion of Mahomet or the Grand Lama; and for this plain reason, that the case assumes that we are a Christian people, and the morality of the country is deeply ingrafted in Christianity."1

In order that an utterance or writing may be considered a legal blasphemy, it must be accompanied by malice and a willful purpose to offend the sensibilities of Christians. The malice or evil purpose is the gravamen of the wrong. The very same words, at least the same thoughts, may, under other circumstances, and with a different purpose, be lawful; and the free expression of them may be guaranteed by the constitutional provisions in respect to religious liberty. Religious liberty is impossible without freedom of expression and profession of one's faith and doctrines. Religious liberty implies the utmost freedom in the promulgation of the creed one professes, and exhortation to non-believers to embrace that faith. The serious and honest discussion of the doctrinal points of the Christian or any other religion is protected from infringement by our constitutional limitations. But no one can claim, under these provisions of the constitution, the right of indulgence in "offensive levity, or scurrilous and opprobrious language," which serves no good purpose, and, when done in public, is likely to bring about more or less disturbance of the public order. Such actions and such language, whether written or spoken, constitute a nuisance, which comes within the jurisdiction of law. It is legal blasphemy. The statute against blasphemy "does not prohibit the fullest inquiry and the freest discussion, for all honest and fair purposes, one of which is the discovery of truth. It admits the freest inquiry, when the real purpose is the discovery of truth, to whatever result such

inquiries may lead. It does not prevent the simple and sincere avowal of a disbelief in the existence and attributes of a supreme intelligent being, upon suitable and proper occasions. And many such occasions may exist; as where a man is called a witness, in a court of justice and questioned upon his belief, he is not only permitted, but bound, by every consideration of moral honesty, to avow his unbelief, if it exists. He may do it inadvertently in the heat of debate, or he may avow it confidentially to a friend, in the hope of gaining new light on the subject, even perhaps whilst he regrets his unbelief; or he may announce his doubts publicly, with the honest purpose of eliciting a more general and thorough inquiry, by public discussion, the true and honest purpose being the discovery and diffusion of truth. None of these constitute the willful blasphemy prohibited by this statute."[1]

[Back to Table of Contents]

§ 66.

Permissible Limitations Upon Religious Worship.—

While the constitution of the United States prohibits all interference with the free exercise of religion according to the dictates of the conscience, and guarantees before the law a substantial equality to all systems of religion, by the influence of natural social forces, Christianity has become a part of the common law of this country to the extent of those of its moral precepts, which have a bearing upon social order, and the breach of which is pronounced by common opinion to be injurious to the welfare of society. Immorality and crime, according to public sentiment as it has been given public expression in the laws of the country, cannot be sanctioned and permitted to those, who through their mental aberrations have adhered to and professed a religion, which authorizes and perhaps commands the commission of what is pronounced a crime. An act is still a crime, notwithstanding the actor's religious belief in its justifiableness. So far, therefore, as religious worship involves the commission of a crime, or constitutes a civil trespass against the rights of others, it can and will be prohibited. As Judge Cooley happily expresses it: "Opinion must be free; religious error the government should not concern itself with; but when the minority of any people feel impelled to indulge in practices or to observe ceremonies that the general community look upon as immoral excess or license, and therefore destructive of public morals, they have no claim to protection in so doing. The State can not be bound to sanction immorality or crime, even though there be persons in a community with minds so perverted or depraved or ill-informed as to believe it to be countenanced or commanded of heaven. And the standard of immorality or crime must be the general sense of the people embodied in the law. There can be no other."[1] Thus it has been held by the Supreme Court of the United States that the religious liberty of the Mormons of Utah is not infringed by the act of Congress providing penalties for the practice of polygamy, which is sanctioned or commanded by their religious creed.[2] In many of the State constitutions,—notably, California, Colorado, Connecticut, Florida, Georgia, Illinois, Maryland, Minnesota, Mississippi, Missouri, Nevada, New York, South Carolina, there are provisions to the effect that the constitutional guaranty of religious liberty is not to justify or sanction immoral or licentious acts, the practice of which threatens the peace or moral order of society.

Under the English law, legacies of money to be expended for masses for the repose of the soul of a deceased person, whether it be the testatrix or some one else, was declared void, because it was a gift for, what was declared by the English statute, a superstitious use. The prohibition of such a legacy was prompted by the then existing religious antagonism and intolerance. It would hardly require an adjudication to satisfy us of the unconstitutionality of such a law under our constitutional guaranties of religious liberty; but in the case cited below this ruling has been made by the New Jersey Supreme Court.[3]

Of late years the question of police regulation of religious worship has assumed a rather important as well as curious phase, in consequence of the formation of religious unions, variously called Salvation Army, Band of Holiness, etc., which parade in the public streets, conduct religious exercises in the market place, or other prominent thoroughfares, and do other things of a like character; with the desire to attract the attention of those classes of society which are beyond the reach of the ordinary Christian and moral influences.1 As long as these unions are quiet and peaceable in their actions, neither creating any public disturbance nor obstructing the thoroughfare, and are not by their utterances so rudely offensive to the public sentiment, as tinged and colored by the prevailing influence of Christianity as to endanger the public peace, there will probably be no question raised against the continuance of their public parades and exhibitions. But suppose an Israelite, a Chinaman, a Mohammedan, the infidel or the atheist, should undertake in the public streets to preach upon the peculiar doctrines of their respective religions, and in their efforts to win disciples should enter upon a free and searching criticism of the distinctive doctrines of the Christian religion; will they be permitted to proceed with their efforts at proselytism, and outrage the prevailing sentiment by utterances, which however honest are held by the majority of the community to be little less than blasphemous? If the public peace is endangered by these public meetings, they can be lawfully prohibited, whether the doctrines taught be Christian or Hebrew, infidel or Mohammedan. All religions are equal before the law, and the Christian has no more right to disturb the public peace by preaching the gospel of Christ in the streets of the Jewish or other unchristian quarter of a city, than has the Jew or infidel a right to threaten the public peace by the promulgation of his religious doctrines in a Christian community. But would it be permissible to prohibit by law discourses which are designed to assail and supplant the Christian religion with some other creed? The quiet and peace of mind of a Christian believer is greatly disturbed, and his inalienable right to “the pursuit of happiness” invaded, by hearing upon the public streets and highways animadversions and free criticisms of the Christian doctrines and institutions, in whose divine origin and truth he has implicit faith. And being a trespass it would seem permissible to prohibit all such discussions. But the Jew’s or infidel’s right to “the pursuit of happiness” is as much invaded by the Christian exhorter’s animadversions upon their religious tenets, and is entitled to equal protection. We therefore conclude, *first,* that public religious discussions are not nuisances at common law, that is, independently of statute, unless they incite the populace to breaches of the peace, or obstruct the thoroughfare, and in that case the breach of the peace or obstruction of locomotion constitutes the offense against the law rather than the discourse. However, on the ground that all religious discussions on the public streets are more or less calculated to disturb the mental rest and quiet of those whose religious opinions are assailed, we hold that these public meetings can be prohibited altogether. But a law which prohibited those only, which are conducted by the opponents of the Christian religion, would be unconstitutional on account of the discrimination against other religions and in favor of the Christian religion. All religious discourses in the street and other public places should be prohibited or none at all.

[Back to Table of Contents]

§ 67.

Religious Discrimination In Respect To Admissibility Of Testimony.—

According to the English common law, no one was a competent witness who did not believe in the existence of God, and of a state of rewards and punishments hereafter. This rule has been recognized and enforced to its fullest extent in the earlier cases,[1] and it was almost universally required by the courts of this country, that the witness, in order to be competent, should believe in a superintending Providence, who can and would punish perjury.[2] The reason for the rule was declared to be, that without such belief an oath could not be made binding upon the conscience, and such a person's testimony was therefore unworthy of belief. The growth of public opinion towards the complete recognition of religious liberty is exerting its influence upon this rule, and in many of the State constitutions there are provisions which abolish this and every other religious qualification of witnesses.[3] Mr. Cooley says, "wherever the common law remains unchanged, it must, we suppose, be held no violation of religious liberty to recognize and enforce its distinction." But it would appear to us that the enforcement of such a law would violate the constitutional guaranty of religious liberty, and hence the enactment of this constitutional provision was an implied repeal of the common-law requirement.[4]

[Back to Table of Contents]

§ 68.

Sunday Laws.—

The most common form of legal interference in matters of religion is that which requires the observance of Sunday as a holy day. In these days, the legal requirements do not usually extend beyond the compulsory cessation of labor, the maintenance of quiet upon the streets, and the closing of all places of amusements; but the public spirit which calls for a compulsory observance of these regulations is the same which in the colonial days of New England imposed a fine for an unexcused absence from divine worship. Although other reasons have been assigned for the State regulation of the observance of Sunday, in order to escape the constitutional objections that can be raised against it, if it takes the form of a religious institution,[1] those who are most active in securing the enforcement of the Sunday laws do so, because of the religious character of the day, and not for any economical reason. While it is not true that the institution of a special day of rest for all men is "a *purely* religious idea,"[2] it is because of the strong influence of the religious idea that there are active supporters of such laws. Whatever economical reasons may be urged in favor of the Sunday laws, requiring the observance of the day as a day of general rest from labor, their influence upon the people would be powerless to secure an enforcement of these laws. The effectiveness of the laws is measured by the influence of the Christian idea of Sunday as a religious institution. "Derived from the Sabbatical institutions of the ancient Hebrew, it has been adopted into all the creeds of succeeding religious sects throughout the civilized world; and whether it be the Friday of the Mohammedan, the Saturday of the Israelite, or the Sunday of the Christian, it is alike fixed in the affections of its followers, beyond the power of eradication, and in most of the States of our confederacy, the aid of the law to enforce its observance has been given under the pretense of a civil, municipal or police regulation."[3]

But Sunday, as a religious institution, can receive no legal recognition. It is manifest that the religious liberty of the Jew or the infidel would be violated by a compulsory observance of Sunday as a religious institution. While such a regulation, if it did not extend to a prohibition of the Jew's religious observance of the seventh day, or to a compulsory attendance upon Christian worship, may not amount to a direct infringement of his religious liberty, he may still reasonably claim that it operates indirectly as a discrimination against his religion, by requiring him to respect Sunday as a day of rest, while his conscience requires of him a like observance of Saturday.[1] But the legal establishment of Sunday as a religious institution, would violate the Christian's religious liberty, as much as that of the Jew. The compulsory observance of a religious institution against conscience is no more a violation of the constitutional limitations than a like compulsion in conformity with one's religious convictions. "The fact that the Christian voluntarily keeps holy the first day of the week does not authorize the legislature to make that observance compulsory. The legislature cannot compel a citizen to do that which the constitution leaves him free to do, or omit, at his election."[2] We therefore conclude that Sunday laws, so far as they require a religious

observance of the day, are unconstitutional, and cannot be enforced. If these laws can be sustained at all, they must be supported by some other unobjectionable reasons.3 But there have been decisions in favor of the compulsory observance of Sunday as a religious institution.1

Notwithstanding the strictly religious aspect the observance of a general day of rest has always assumed among all people, and under all systems of religion; although the observance of such a day has always been taught to be a divine injunction; it is claimed, with much show of reason, that this custom, even as a religious institution, was originally established as a sanitary regulation, designed to procure for the individual that periodical rest from labor, which is so necessary to the recuperation of the exhausted energies; and the religious character was given to it, in order to secure its more universal observance. In the primitive ages of all nations, theology, medicine and law were administered by the same body of men; and it was but natural that they should apply to a much needed sanitary regulation the spiritual influence of theology, and the obligation of law. Under this view of the matter, the observance of a day of rest was, in the order of history, primarily, a sanitary regulation, and secondarily, a religious institution. Under our constitutional limitations, it is only in its primary character that an observance of the law can be exacted.

All sanitary regulations operate directly upon the individual; and from the medical standpoint, their primary object is the benefit to the individual. It is so likewise with the observance of a day of rest. It is the individual which is primarily benefited by the cessation from labor, and the community or society is only remotely and indirectly benefited by the increased vitality of his offspring and possibly relief from the public burden of an early decrepitude, the result of overwork. The failure to observe this law of nature, calling for rest from labor on every seventh day,—for this has been demonstrated by the experience of ages to be a law of nature,—is, like every other inordinate gratification of one's desires, a vice, and not the subject of law. The possible evil, flowing from this "vice," will not justify the State authorities in entering the house and premises of a citizen, and there compel him to lay down his tool or his pen, and refrain from labor, on the ground that his unremittent toil will possibly do damage to society through his children. How can it be proved *a priori* that the man needs the rest that the law requires him to take? He may be fully able to continue his labor, at least during a portion of the Sunday, without doing any damage to anybody.1 Furthermore, it may be shown that he has for special reasons, or because his religion requires it, abstained from labor for the required time on some other day. And having done so from the individual standpoint, he has substantially complied with the requirements of the law.1 Then must the conclusion be reached, that there are no satisfactory grounds upon which Sunday laws can be sustained, and the constitutional objections avoided?

It matters not what is the moving cause, or what amount of gratification is had out of the act, the commission of a trespass upon another's rights, or the reasonable fear of such a trespass, always constitutes sufficient ground for the exercise of police power. The prevention of a trespass is the invariable purpose of a police regulation. It is the right of every one to enjoy quietly, and without disturbance, his religious liberty, and his right is invaded as much by noise and bustle on his day of rest, varying only in

degree, as by a prohibition of religious worship according to one's convictions. Noisy trades and amusements, and other like disturbances of the otherwise impressive quiet of a Sunday, may therefore be prohibited on that day, in complete conformity with the limitations of police power.2 But the prosecution of noiseless occupations, and the indulgence in quiet, orderly amusements,1 since they involve no violation of private right, cannot be prohibited by law without infringing upon the religious liberty of those who are thus prevented, and such regulations would therefore be unconstitutional. It is barely possible, but doubtful, that a law could be sustained under the principles here advanced, which required that the front doors of stores and places of amusement should be kept closed on Sunday, but not otherwise interfering with the noiseless occupations and diversions. The total prohibition of such employments and labor on Sunday, except possibly for a reason to be suggested and explained later, could only be justified by the religious character of the day, and we have already seen that that aspect of Sunday cannot be taken into account, in framing the Sunday laws.

But there is, perhaps, a constitutional reason why the prohibition of labor on Sunday should be extended to other than noisy trades and employments. The reason calls for the avoidance of an indirectly threatened trespass, rather than the prohibition of a direct invasion of right. In the ideal state of nature, when free agency and independence of the behests of others may be considered factual, the prosecution of a noiseless trade or other occupation could not in any sense be considered as, either constituting a trespass, or threatening one. Each man, being left free to do as he pleased, would then have the equal liberty of joining in the religious observance of the day or of continuing his labor, subject to the single condition, that he must not in doing so disturb the religious worship of others. But we are not living in a state of nature. Whatever the metaphysicians or theologians may tell us about free will, in the complex society of the present age, the individual is a free agent to but a limited degree. He is in the main but the creature of circumstances. Like the shuttle, he may turn to the right or to the left, but the web of human events is woven, unaffected by this freedom of action. Those who most need the cessation from labor are unable to take the necessary rest, if the demands of trade should require their uninterrupted attention to business. And if the law did not interfere, the feverish, intense desire to acquire wealth, so thoroughly a characteristic of the American nation, inciting a relentless rivalry and competition, would ultimately prevent, not only the wage-earners, but likewise the capitalists and employers themselves, from yielding to the warnings of nature, and obeying the instinct of self-preservation by resting periodically from labor, even if the mad pursuit of wealth should not warp their judgment and destroy this instinct. Remove the prohibition of law, and this wholesome sanitary regulation would cease to be observed. No one, if he would, could do so. The prohibition of labor for these reasons may be contradictory of the constitutional affirmation of the equality of all men; and the prohibitory law may be practically unenforcible; but it would be difficult to establish any positive constitutional objection to it.1 It has been urged that this law, when founded upon this reason, of protection to the individual, may be sustained, if it was confined in its operations to slaves, minors, apprentices and others who are required to obey the commands of others, and designed to protect them from the cruelty of incessant toil.1 But the slave or apprentice is no more bound to obey the behests of others, and to

work at their command, than the free laborer, clerk, and even the employer himself, under the irresistible force of competition, in the struggle for existence and the accumulation of wealth. "It is no answer to the requirements of the statute that mankind will seek cessation from labor by the natural influences of self-preservation. The position assumes that all men are independent, and at liberty to work whenever they choose. Whether this be true or not in theory, it is false in fact; it is contradicted by every day's experience. The relation of superior and subordinate, master and servant, principal and clerk, always has and always will exist. Labor is in a great degree dependent on capital, and unless the exercise of power which capital affords is restrained, those who are obliged to labor will not possess the freedom for rest which they would otherwise exercise. Necessities for food and raiment are imperious, and exactions of avarice are not easily satisfied. It is idle to talk of a man's freedom to rest, when his wife and children are looking to his daily labor for their daily support. The law steps in to restrain the power of capital. Its object is not to protect those who can rest at their pleasure, but to afford rest to those who need it, and who, from the conditions of society, could not otherwise obtain it. * * * The authority for the enactment, I find in the great object of all governments, which is protection. Labor is necessarily imposed by the condition of our race, and to protect labor is the highest office of our laws."1 For various reasons, laws have been generally sustained, which compel the closing of the stores of business.2 If the reasoning here presented be correct, and the premises into which it has been formulated be impregnable, the following conclusion is inevitable, viz.: that no Sunday law is constitutional which does more than prohibit those acts, which are noisy and are therefore calculated to disturb the quiet and rest of Sunday worshipers, or which in their commission demand or are likely to demand, the services of others, who cannot refuse to serve, on account of the common interdependence of mankind. The doing of any act, which is noiseless and does not require the service of others, cannot be prohibited.

It is not maintained that this limitation upon the power of the State to regulate the observance of Sunday, is recognized and indorsed by the decisions of our courts. On the contrary, there are police regulations in the different States, which are sustained in violation of this rule of limitation. The laws which prohibit quiet and orderly amusements cannot be sustained under the rule, and so also those laws, which make void the commercial paper and deeds which are executed on Sunday. Other instances of existing legislation, contradictory of this rule of limitation, may be cited, but it is not necessary. But although not generally supported by the authorities, it is believed to be the correct rule.

The same reasons, which are here advanced, would likewise support and justify legislation, designed to protect the Jew in his religious observance of Saturday, and the Mohammedan in his enjoyment of Friday. But if the rule were carried to the extreme, of giving equal protection to the enjoyment of the religious days of every sect, the business prosperity of the country would be seriously impaired. Although the Jew and the Mohamedan have the same right to the quiet and undisturbed enjoyment of his holy day, the public welfare, which likewise is the main spring to the Sunday laws, requires that his enjoyment of his religion should sustain the burden and annoyance occasioned by the general prosecution of trades and occupations on their holy days.1 The selection of Sunday, as the day of rest to be observed by all, is not

justified by its religious character, although its religious character, in the eyes of the masses of this country, suggests the reason of its selection in preference to some other day. The interference of the State is, after all, for the purpose of promoting the public welfare, for the purpose of securing to society the benefits arising from a general periodical cessation from labor; and that object can be best attained by setting apart as a legal day of rest, that day which is looked upon as a holy day by the vast majority of our people. In some of our States, there are statutory exceptions in favor of those who conscientiously observe some other day of the week as a holy day, and abstain from labor on that day; and in Ohio, it has been held that a statute which did not contain such an exception, was for that reason unconstitutional.1 But in other States, it is held that the Sunday law in its application to the orthodox Jew, was not in violation of the article in the State constitution, which declares that no person shall "upon any pretense whatever be hurt, molested, or restrained in his religious sentiments or persuasions."2 The restraint upon the right to engage in lawful employment and to do otherwise lawful acts, is reasonable, because necessary to the successful maintenance of a general day of rest.3

While it is claimed that the State cannot go beyond the limitations that have been presented, in enacting laws for the observance of Sunday as a day of rest, it rests with the discretion of the legislature how far the enactment should extend within these limitations, and the scope of the legislation has varied with the public policy in each State. We have already noticed exemptions from the operation of the Sunday laws in favor of the Jew. In some of the States only a person's ordinary calling is intended to be suppressed;1 and there is an universal exception in favor of works of charity and necessity. But what constitutes charity and necessity is not viewed in the same light in every State. It is a common rule that traveling on Sunday, except in cases of charity or necessity, is unlawful, and any one injured while so doing cannot recover damages.2 But whether a certain act is looked upon as a necessity, will depend largely upon the condition of public sentiment, its mere fitness and propriety being the only standard of right and wrong.1 We must therefore expect to find contradictory conclusions upon this question of necessity. In Pennsylvania it is not considered a work of necessity for a barber to shave his customers on Sunday,2 while in Indiana it is deemed to be a question of fact, to be determined by a jury.3 In some States the running of railroad trains and the operation of street railroads are held to be necessary.4 In other States both have been held to be violations of the Sunday laws.5 The transportation of cattle received on Sunday,6 feeding stock and gathering the necessary feed,7 the gathering of grain which may be injured if left in the field until Monday,8 the expenditure of the labor necessary to prevent waste of sap in making maple sugar,9 have been held to be lawful because they were works of necessity. In other States similar acts were held to be unlawful, on the ground of not being deemed necessary.1

Later decisions are quite numerous, in which the question is asked and answered, what employments are permitted, as being works of necessity or charity, to be pursued on Sunday. Some of these cases are given in the note below.2

[Back to Table of Contents]

CHAPTER VIII.

FREEDOM OF SPEECH AND LIBERTY OF THE PRESS.

§ 81.

Police Supervision Prohibited By The Constitutions.—

A popular government, and hence freedom from tyranny, is only possible when the people enjoy the freedom of speech, and the liberty of the press. If the individual is not free to publish by word of mouth or writing, or through the press, the complaints of encroachments of the government or of individuals upon his rights and liberties, he is deprived of his liberty, and he is not a freeman. Even if there were no special constitutional restrictions upon the governmental control of these rights, the State regulation would be unconstitutional, which denied the right of the individual to publish what he pleases, or which prohibited the publication of newspapers or other periodicals or books, on the general ground that they would involve the deprivation of liberty and the right to pursue happiness.

But the liberty of speech and of the press is not to be confounded with a licentiousness and a reckless disregard of the rights of others. No one can claim the right to slander or libel another, and the constitutions do not permit or sanction such wrongful acts. Liberty of speech and of the press, therefore, means the right to speak or publish what one pleases, the utterance of which does not work an injury to any one, by being false. The common law provided for the due punishment of such trespasses upon the right to reputation, and ordinarily these remedies, which prevail generally, afford sufficient protection to the individual and the public. But sometimes, and oftener in these later days, when the press has acquired extraordinary power, these remedies prove ineffectual. The tendency of the press, at least of this country, is to publish sensational, and oftener false, accounts of individual wrongs and immoralities, to such an extent that newspapers too often fall properly within the definition of obscene literature. If possible, the publication of such matter should be suppressed, or at least published in such a way, as to do little or no harm to the morals of the community.[1]

Then again, we have newspapers, in whose columns we find arguments and appeals to passion, designed to incite the individual who may be influenced thereby to the commission of crimes, appeals to “dynamiters,” socialists and nihilists, and all other classes of discontents, who believe the world has been fashioned after a wrong principle, and needs to be remodeled. Of course, those who do these reprehensible things may be punished for each overt act.

But the only effective remedy would be the establishment of a censorship over the press, by which such publication may be prevented, instead of being punished after the evil has been done. Under the general constitutional provisions, this supervision of

the press would be permissible, and would not infringe the liberty of the individual. It would be only such a restraint upon the liberty of speech and of the press, as would promote public welfare, and would be sanctioned as an exercise of the police power of the government. But such a control of the press would be very liable to abuse, and through it the absolute suppression of the press would be rendered possible, if the government should fall into the hands of designing men; and at all events it would be an effective engine of oppression.

Profiting by their experience in the colonial days, when the English government exercised a control over the press, sometimes to the extent of prohibiting the publication of the paper, and always to the extent of suppressing all protests and arguments against England's oppressive acts; our forefathers provided by constitutional provisions, both in the Federal and in the State constitutions, that the liberty of speech and of the press shall not be abridged by any law. The provision varies in phraseology in the different constitutions, but the limitation upon the power of government is the same in all cases. While this constitutional provision prohibits all control or supervision of the press in the way of a license or censorship, the slanderer or libeler may still be punished. He suffers the penalty inflicted by the law for the abuse of his privilege. The opinion of Chief Justice Parker of Massachusetts has been frequently quoted, and generally recognized as presenting the correct construction of this constitutional provision. In Commonwealth *v.* Blanding,[1] he says: "Nor does our constitution or declaration of rights abrogate the common law in this respect, as some have insisted. The sixteenth article declares that 'liberty of the press is essential to the security of freedom in a State; it ought not, therefore, to be restrained in this Commonwealth. The liberty of the press, not its licentiousness: this is the construction which a just regard to the other parts of that instrument, and to the wisdom of those who founded it, requires. In the eleventh article, it is declared that 'every subject of the Commonwealth ought to find a certain remedy, by having recourse to the laws, for injuries or wrongs which he may receive in his person, property, or character;' and thus the general declaration in the sixteenth article is qualified. Besides, it is well understood and received as a commentary on this provision for the liberty of the press, that it was intended to prevent all such *previous restraints* upon publications as had been practiced by other governments, and in early times here to stifle the efforts of patriots towards enlightening their fellow-subjects upon their rights and the duties of rulers. The liberty of the press was to be unrestrained, but he who used it was to be responsible in case of its abuse; like the right to keep firearms, which does not protect him who uses them for annoyance or destruction."[1] But it has been held that the constitutional prohibition of the censorship of the press does not inhibit the imposition of a license tax upon newspapers.[2]

But while all *previous restraints* are forbidden by this provision of the constitution, the permissible restraints upon the freedom of speech and of the press are not confined to responsibility for private injury. All obscene or blasphemous publications may be prohibited, as tending to do harm to the public morals. So, likewise, may the publication of all defamatory statements, whether true or false, concerning private individuals, in whom the public have no concern, be prohibited, as was the case at common law, and is now in some of the States; on the ground that such publications do no good, and excite breaches of the peace. In neither case is there any private

injury inflicted, but the harm to the public welfare is the justification of the prohibition.

"The constitutional liberty of speech and of the press, as we understand it, implies a right to freely utter and publish whatever the citizen may please, and to be protected against any responsibility for so doing, except so far as such publications, from their blasphemy, obscenity, or scandalous character, may be a public offense, or as, by their falsehood and malice, they may injuriously affect the standing, reputation, or pecuniary interests of individuals."1

So, also, is it not to be inferred from the prohibition of a censorship of the press, that the press can, without liability for its wrongful use, make use of the constitutional privilege for the purpose of inciting the people to the commission of crime against the public. The newspapers of anarchists and nihilists cannot be subjected to a censorship, or be absolutely suppressed; but if the proprietors should in their columns publish inflammatory appeals to the passion of discontents, and urge them to the commission of crimes against the public or against the individual, they may very properly be punished, and without doubt the right to the continued publication may be forfeited as a punishment for the crime.

A very curious and interesting question of constitutional law has been raised in New York, involving an alleged infringement of the freedom of speech and liberty of the press. An association of individuals had designed to honor the memory of a philanthropic lady by the erection in a public place of a statue of her, when the members of her family sought to prevent it, on the ground that their assent to the project was necessary, inasmuch as the decedent was not a public character. The association was enjoined from the making and placing on exhibition of the statue, notwithstanding their claim that it was an infringement of their constitutional right to freely speak, write and publish their sentiments on all subjects.1

It has also been claimed that police regulations, which require a permit from some public official, before it can be lawful for any one to use the parks or other public places for public assemblies and speech-making, are an infringement of the constitutional right of freedom of speech or of assembly. But the courts have held that this is only a reasonable regulation, and not the denial of the right of public assembly.2

The Postal Regulations contain provisions for preventing the use of the mails for the promotion of evil and wrong-doing, and they have been generally sustained, as being no violation of the constitutional guaranty of the freedom of speech and the liberty of the press. One regulation prohibits the transmission of obscene literature or printed or written matter, or of matter which is used in the dissemination of crime or immorality.3 But it must be shown that the packages, deposited in the mail, does contain the objectionable matter. A citizen has a right to the use of the mail for the transmission of unobjectionable matter, and he cannot be deprived of this right merely on suspicions, more or less well-grounded, that he is using the mail for an unlawful purpose. Thus, in the effort to suppress the Louisiana Lottery, an act of Congress authorized the Attorney-General—when satisfactory proof was presented to him, that

a person, firm or corporation was habitually making use of the mail for the purpose of conducting a lottery or other fraudulent scheme,—to order the postmaster to return all mail matter received at his office, addressed to such person, firm or corporation. It was held that the act of Congress was constitutional so far as it applied to a corporation which was engaged in the unlawful business, and in no other lawful business. In such a case, it is to be presumed that letters and other mail matter addressed to such a corporation are intended to further the unlawful enterprise. But where the regulation is enforced against a private individual, in the case of sealed packages, there is no such strong conclusion that it contains objectionable matter, and the denial to such a person of the use of the mail for all purposes is unconstitutional. It deprives him of the undoubted right to make use of the mail for lawful purposes, and is in violation of the fourth amendment of the constitution, which secures him against unreasonable seizures of his papers.1

[Back to Table of Contents]

CHAPTER IX.

REGULATION OF TRADES AND OCCUPATIONS.

[Back to Table of Contents]

§ 85.

General Propositions.—

It will probably not be disputed that every one has a right to pursue, in a lawful manner, any lawful calling which he may select. The State can neither compel him to pursue any particular calling, nor prohibit him from engaging in any lawful business, provided he does so in a lawful manner. It is equally recognized as beyond dispute, that the State, in the exercise of its police power, is, as a general proposition, authorized to subject all occupations to a reasonable regulation, where such regulation is required for the protection of public interests, or for the public welfare. It is also conceded that there is a limit to the exercise of this power, and that it is not an unlimited arbitrary power, which would enable the legislature to prohibit a business, the prosecution of which inflicts no damage upon others. But the difficulty is experienced, when an attempt is made to lay down a general rule, by which the validity of a particular regulation may be tested. No objection can be raised to such a regulation, unless it contravenes some constitutional provision. "The State legislatures have the power, unless there be something in their own constitution to prohibit it, of entirely abolishing or placing under restrictions any trade or profession, which they may think expedient."[1] And the courts, in passing upon the validity of a statute, should hold strongly to the presumption that the legislature had, in the enactment of the police regulation under inquiry, the sole desire and intention of thereby promoting the public health, comfort and safety, by the prohibition of some act injurious thereto. If the statute admits of two constructions, one of which is a reasonable exercise of police power, and the other is unreasonable, in that it promotes or does not promote the public interests; the former construction should be adopted, and the statute sustained as a constitutional exercise of the police power.[2]

It is a matter of great doubt, whether in any of the State constitutions there is any special limitation upon the power of the legislature to regulate and enjoin the prosecution of trades and occupations; and if there is any limitation it must be inferred from the general clauses, such as "every man has an inalienable right to life, liberty, and the pursuit of happiness," or "no man shall be deprived of his life, liberty and property, except by due process of law." No man's liberty is safe, if the legislature can deny him the right to engage in a harmless calling; there is certainly an interference with his right to the pursuit of happiness in such a case; and such a prohibition would be a deprivation of his liberty "without due process of law." Judge Cooley says in this connection: "What the legislature ordains and the constitution does not prohibit must be lawful. But if the constitution does no more than to provide that no person shall be deprived of life, liberty, or property, except by due process of law, it makes an important provision on this subject, because it is an important part of civil liberty to have the right to follow all lawful employments."[1] If these general constitutional provisions contain the only limitations upon the legislative power to regulate employments, in order to determine what are the specific limitations which these

provisions impose, it will be necessary to refer to the limitations upon the police power in general.

It has already been determined that, in the exercise of the police power, personal liberty can be subjected to only such restraint as may be necessary to prevent damage to others or to the public.1 Police power, generally, is limited in its exercise to the enforcement of the maxim, *sic utere tuo ut alienum non lædas.*2

Whenever, therefore, the prosecution of a particular calling threatens damage to the public or to other individuals, it is a legitimate subject for police regulation to the extent of preventing the evil. It is always within the discretion of the legislature to institute such regulations when the proper case arises, and to determine upon the character of the regulations. But it is a strictly judicial question, whether the trade or calling is of such a nature, as to require or justify police regulation. The legislature cannot declare a certain employment to be injurious to the public good, and prohibit it, when, as a matter of fact, it is a harmless occupation. "The position, however, is taken on the part of the State, that it is competent for the legislature, whenever it shall deem proper, to declare the existence of any property and pursuit deemed injurious to the public, *nuisances,* and to destroy and prohibit them, as such; and that such an action of the legislature is not subject to be reviewed by the courts. We deny this position. We deny that the legislature can enlarge its power over property or pursuits by declaring them nuisances, or by enacting a definition of a nuisance that will cover them. Whatever it has a right by the constitution to prohibit or to confiscate, it may thus deal with, without first declaring the matter to be a nuisance; and whatever it has not a right by the constitution to prohibit and confiscate, it cannot thus deal with, even though it first declare it a nuisance."1 It is also a judicial question whether the police regulation extends beyond the threatened evil, and prohibits that which involves no threatening danger to the public. If it is unconstitutional to impose police regulations upon an innocent calling, it must be likewise unconstitutional to place an occupation under police restraint beyond what is necessary to dissipate the threatening evil. The legislature has the choice of means to prevent evil to the public, but the means chosen must not go beyond the prevention of the evil and prohibit what does not cause the evil. To illustrate, the keeping of a public gambling house is in itself a public evil, and the legislature may place it under whatever police control it may see fit, even to the extent of prohibiting the keeping of them. But the profession of medicine is a proper and necessary calling, and if pursued only by men, possessed of skill, instead of threatening public evil, is of the highest value to a community. The only evil, involved in the prosecution of that calling, is that which arises from the admission of incompetent men into the profession. The police regulation of the practice of medicine must, therefore, be confined to the evil, and any prohibition or other restrictive regulation which went beyond the exclusion of ignorant or dishonest men, would be unconstitutional. The police regulation of trades and professions, must, therefore, be limited to such restrictions and limitations as may be necessary to prevent damage to the public or to third persons. Keeping these general rules in mind, we will now consider the various methods of police interference with employments.

[Back to Table of Contents]

§ 86.

Prohibition As To Certain Classes.—

A calling may be generally harmless, when prosecuted by some classes of persons, and very harmful when engaged in by others. Thus, for example, it can readily be seen that the keeping of billiard saloons, of bar rooms, and other public resorts by women, will prove highly injurious to the public morals, while there is no such peculiar danger arising from the keeping of such places by men. A law which prohibited women from engaging in these occupations would be for that reason justifiable under the constitutional limitations.1 Regulations have also been sustained, which were designed to prevent men of bad repute from engaging in employments, which from their nature are likely to become public nuisances, if conducted without safeguards. Thus it has been common, for this reason, to require hackmen, and keepers of places of public resort, to take out a license, and to give security for their good behavior or testimonials of good character. It has also been held that "the State may forbid certain classes of persons being employed in occupations which their age, sex, or health renders unsuitable for them, as women and young children are sometimes forbidden to be employed in mines and certain kinds of manufacture."1 The regulations, prohibiting women and children from being employed in certain callings or trades, are becoming quite common, particularly in regard to child labor. In the case of women, the prohibition relates generally to working in mines. But children under ages, stated in and varying with the provisions of the different States, are in some States prohibited altogether from working outside of their homes, while in others they are only prohibited from engaging in certain kinds of work. The total prohibition is designed to aid in the enforcement of the attendance upon the school, and both the total and partial prohibitions of child labor are designed to promote their physical and mental growth, by the removal of all strains, which may be caused by excessive labor. In so far as the employment of a certain class in a particular occupation may threaten or inflict damage upon the public or third persons, there can be no doubt as to the constitutionality of any statute which prohibits their prosecution of that trade. But it is questionable, except in the case of minors, whether the prohibition can rest upon the claim that the employment will prove hurtful to them. Minors are under the guardianship of the State, and their actions can be controlled so that they may not injure themselves.1 But when they have arrived at majority they pass out of the state of tutelage, and stand before the law free from all restraint, except that which may be necessary to prevent the infliction by them of injury upon others. It may be, and probably is, permissible for the State to prohibit pregnant women from engaging in certain employments, which would be likely to prove injurious to the unborn child; but there can be no more justification for the prohibition of the prosecution of certain callings by women, because the employment will prove hurtful to themselves, than it would be for the State to prohibit men from working in the manufacture of white lead, because they are apt to contract lead poisoning, or to prohibit occupation in certain parts of iron smelting works, because the lives of the men so engaged are materially shortened.

[Back to Table of Contents]

§ 87.

Police Regulation Of Skilled Trades And Learned Professions.—

Where the successful prosecution of a calling requires a certain amount of technical knowledge and professional skill, and the lack of them in the practitioner will result in material damage to the one who employs him, it is a legitimate exercise of police power to prohibit any one from engaging in the calling who has not previously been examined by the lawfully constituted authority and received a certificate in testimony of his qualification to practice the profession. The right of the State to exercise this control over skilled trades and the learned professions, with a single exception in respect to teachers and expounders of religion, has never been seriously questioned. Thus we find in every State statutes which provide for the examination of those who wish to engage in the practice of the law, of medicine and surgery, of pharmacy, and of those who desire to ply the trade of plumbing.1 And sometimes we find statutes which require all engineers to be examined before they are permitted to take charge of an engine. So, also, in England, it was once made necessary for one to serve an apprenticeship before he was permitted to pursue any one of the skilled trades. That is not now the law in the United States, but there would be no constitutional objection to such a statute, if it were enacted. Judge Cooley says: "No one has any right to practice law or medicine except under the regulations the State may prescribe. * * * The privilege may be given to one sex and denied to the other, and other discriminations equally arbitrary may doubtless be established."2 A distinguished judge of Missouri says there can be no doubt "that the legislature of Missouri can declare the practice of law or medicine an unlawful calling, if they thought fit to do so."3 If the rules heretofore laid down for the determination of the limitation of the police control of employments be sustainable, the position of these distinguished judges is untenable. The professions of law and medicine are profitable employments, to the public as well as to the practitioners; and the only elements of danger arising from the practice of them lies in the admission of incompetent persons into them. Any prohibition which extends further than to prevent the admission of incompetent men will be unconstitutional.

It has been held that women can be denied the right to engage in the practice of law.1 In the State court the principal ground for a denial of the plaintiff's right to engage in the practice of law was maintained to be that, "as a married woman (she) would be bound neither by her express contracts, nor by those implied contracts, which it is the policy of the law to create between attorney and client." In the Supreme Court of the United States, although the opinion of the court, delivered by Justice Miller, was rested upon the fact that the practice of law in Illinois was not one of the privileges and immunities of *citizens of the United States,* as such and therefore did not come within the jurisdiction of the court, in a separate opinion by Judge Bradley, in which Judges Field and Swayne concur, it is claimed that the statutes of a State may prohibit a woman from practicing law, because, on account of the supposed difference in her

mental capacity, she cannot acquire that degree of skill which the successful practice of the law requires.2 Of course, a married woman, under her strict common-law disabilities, cannot make binding contracts, and it would be impossible for her to be sued on any express or implied obligation which she may have incurred in the practice. This no doubt would furnish a justification for a statute which prohibited married women from engaging in the practice of law, provided the disabilities thus imposed by the law are themselves constitutional.1 But in respect to the inability of women to attain the standard of professional skill required by the law to insure clients against the ignorant blunderings of attorneys, one is forced to the conclusion that this, like very many other venerable distinctions between the sexes, is the result of sexual prejudice. Later adjudications have conceded to women the right to practice law, and it is probable that in the course of time, when the influence of the common law conceptions of the legal status of woman is dissipated altogether, any law which denied to woman the right to enter the legal profession on terms of equality with men, would be pronounced by the courts generally to be unconstitutional.2

Judge Cooley's position, in respect to the unlimited power of the State to regulate the practice of law and medicine is that the practice of these professions is a privilege, and cannot be demanded as a matter of right. I can see no ground upon which this claim may be supported, so far as it refers to medicine. The physician and surgeon derives no peculiar benefit from the State, and there can be no substantial difference between his right to pursue his calling and that of a teacher to ply his vocation, or of the merchant to engage in business. They are not enjoying any peculiar privilege. Nor can I see any reason for looking upon the practice of law, outside of the courts, as a privilege. I cannot see why it is a peculiar privilege, derivable from the State, for an attorney to draw up a deed, or to make a will for a client. But inasmuch as courts are creatures of the law, and independently of the State, there can be no courts and no advocates, the right to appear for another in a court of justice may be considered a privilege which may be denied or granted at the pleasure of the State authorities. In England, at an early day, one accused of crime was not allowed to have counsel, and the right to appear by counsel in any case, rests upon rule of law. Yet even with this concession, it may still be claimed that such a privilege should be granted equally and to all, to avoid the constitutional objection to the granting of unequal or special privileges and immunities.1

In respect to the regulation of the practice of medicine, the constitutionality of laws has likewise been questioned and contested in numerous cases, but the regulations have been sustained whenever they were reasonable in serving to promote the public safety and welfare.1 Similar regulations have held to be constitutional when they have been applied to the practice of dentistry1 and of pharmacy.2 The "Boilers Inspection Act" of Minnesota, requiring inspection of boilers and the licensing of engineers, has been sustained as a constitutional exercise of police powers.3 Recently plumbers have been required to be examined and licensed. These regulations of the business of plumbing have been sustained as a constitutional exercise of police power. If it is lawful to require sanitary plumbing in buildings4 it is certainly reasonable to examine into the qualifications of plumbers and their ability to construct sanitary plumbing.5

In respect to the clerical profession, the constitutional guaranties against encroachments on religious liberty and freedom of worship would be violated, if an attempt were made by the State to determine who shall minister to the spiritual wants of the people. Every individual, and every body of people, have a constitutional right to select their own clergymen and expounders of religion, and it can never, under our present constitutions, which ordain a complete separation of church and State, become a matter of State regulation, as it is in some of the states of Europe.

[Back to Table of Contents]

§ 88.

Regulation Of Practice In The Learned Professions.—

Not only does the State undertake to prescribe the terms and conditions for the admission of members to the learned professions, so as to exclude dishonest and incompetent men; but in some instances laws have been enacted to regulate the practice of the professions. Thus, at common law, attorneys were prohibited from making contracts with their clients to receive a certain portion of what is recovered in a suit, as compensation for their services. This was called *champerty*. It is still the law everywhere, in the absence of a repealing statute; but public opinion, in respect to the character of the offense, has so far changed that the law has become a dead letter; and reputable attorneys are daily accepting fees, contingent upon the success of the suit, and proportionate to the amount recovered in the judgment. It is also a common rule of the court that attorneys will not be allowed to become bail or surety for their clients in a pending suit.1

In their capacity as officers of the court, attorneys have from a very early day, both in England and in this country, been held to be liable to be ordered to assume the defense of persons who are on trial under the charge of some crime or infraction of the criminal law. And they are obliged to perform this duty, when ordered, unless they are able to induce the trial judge to excuse them. At the present time, in most of the States, this matter is regulated by statute, and provision is made for the compensation by the State of the attorney, when serving thus under the orders of the court. But at an earlier day it was the universal practice for attorneys to perform this duty to pauper criminals gratuitously. It has been recently held to be constitutional, and no infringement of liberty or property of an attorney to compel him to serve such a criminal without compensation.1

In the practice of medicine, an attempt has often been made by the old school of medicine, the school of allopathy, to bring homeopathy into legal disrepute, and to deny to practitioners of that school equal privileges before the law; but the police power of the State can never be exercised in favor of or against any system of medicine.2 The police power can be brought to bear upon quacks, and disreputable practitioners, to whichever school they may belong, but when reputable and intelligent members of the profession differ in theories of practice, the State has no power to determine which of them, if either, is wrong.3

In the practice of medicine, however, there are legal regulations which the members of the profession are obliged to observe. It is well known that when a death occurs, the physician who has been in attendance upon the deceased is obliged by the law to furnish a certificate, setting forth the cause of death; this certificate being required, before there can be a burial, without a coroner’s inquest. It is also required sometimes of physicians to report to the health officer all cases of infectious or contagious diseases, which they have in charge. Such regulations are readily justifiable; the first,

because the physician's certificate assists in preventing the burial of those who have met with a wrongful or violent death; and the second, because information concerning the location of cases of infectious and contagious diseases will enable the health officers to employ safeguards to prevent an epidemic. But it is not quite so clear that the State has the right to require physicians and midwives to report to some officer, within a certain time, all births and deaths which may come under their supervision, subject to a penalty for failing to perform the duty thus required of them. This regulation is now becoming quite common, and the object of it is to facilitate the collection of statistics. In a case before the Supreme Court of Iowa, such a law was sustained as constitutional; and probably the practical utility of the law, and the absence of any excessive burden in requiring this duty of the physician, will in all cases furnish sufficient justification for the enactment of the law.1

In support of legislation for the prevention of intoxication, it has been held not unreasonable for an ordinance to make it unlawful for a physician to prescribe liquor for a well man.1 As an attempt to evade a law, it is clearly permissible to prohibit it, and if any question can arise in that connection, it would have reference to the validity of the law whose enforcement is designed to be attained by the ordinance. If it was permissible for the State or town to prohibit the sale of liquor except for medicinal purposes, it was proper enough for the town or State to prohibit an evasion of the law by means of false prescriptions.

Although the clerical profession cannot be subjected to police supervision, so far as to determine the character of its *personnel,* or of the doctrines to be taught; yet clergymen in the performance of duties, which are collateral to their main duties, and which have a civil phase as well as a religious phase, may be subjected to the regulations of the State. Thus it is becoming more and more common for State laws to prohibit the solemnization of marriages unless the parties have previously received a marriage license from some civil officer, and requiring the clergyman to return the license, with a certificate from himself, announcing the day of the marriage. Marriage is a civil *status,* as well as a religious institution, and the two are so intimately blended that its regulation by the State in its former character controls its regulation by the church.

[Back to Table of Contents]

§ 89.

Regulation Of Sale Of Certain Articles Of Merchandise.—

The regulations, which would fall under this heading, are very numerous, and most of them are free from all doubt in respect to their validity under our constitutional limitations. They are instituted for the purpose, either of preventing injury to the public, or of thwarting all attempts of the vendor to defraud the vendee.

A regulation, whatever may be its character, which is instituted for the purpose of preventing injury to the public, and which does tend to furnish the desired protection, is clearly constitutional. A good example of this class of regulations, would be the Kentucky statute, which is also found in other States, providing for the inspection of kerosene and other oils, with a view to prohibit the sale of such as ignite below a certain degree of heat. Such a law is a plain and reasonable exercise of the police power of the State.1 So would be any law, providing for the inspection of fresh meat,2 and other reasonable provisions, which are intended to protect the public from the danger, arising from the consumption of unwholesome food. For example, laws are to be found in almost every State for the inspection of milk, and the condemnation and punishment of the sale of adulterated milk. Such laws are undoubtedly constitutional when they go no further than to prohibit and prevent the adulteration of milk.1 So, also, the State may, it has been held, require vendors of fertilizers to have them inspected to protect citizens against fraud in the adulteration of the goods, and impose upon such vendors the cost of inspection even where the tax appears to be in excess of the cost of inspection, if it is not prohibitive in character.2

Another common regulation for the purpose of preventing adulterations of foods is that of preventing the introduction into vinegar of foreign substances which are designed to color it. Such statutes are to be found in a number of the States, including New York, Indiana and Illinois. If the coloring matter is harmless, i. e., not injurious to health, it is very difficult to find a justification for such a regulation. But these laws, in relation to vinegar, have been sustained as constitutional, as a means of preventing the deception of the public by concealing its true or natural appearance.3

Similar and dissimilar legislation have been enacted in the various States, regulating the sale and manufacture of oleomargarine, a well-known substitute for butter, which is manufactured out of the fatty deposits of the cow, and cotton-seed oil, and so prepared that it is a wholesome food, and resembles butter in appearance and taste. In a subsequent section, the attempt, sometimes successful and sometimes unsuccessful, to prohibit altogether the manufacture and sale of oleomargarine, is explained and the objections to such prohibitive legislation are fully set forth.1 Here, reference is made only to legislation which has for its object the regulation of the manufacture and sale of the article in question. In the face of the almost universal concession that oleomargarine, as manufactured, is not an unwholesome food, regulations which fall short of a total prohibition of its manufacture and sale, can be justified only on the

ground, that, as manufactured, the product is so prepared as to enable the dealer to sell it as genuine butter, and thus practice successfully a fraud upon the public. And all the regulations, varied as they are in character and effect, seem to have as their object the prevention of this fraud. In some of the States, oleomargarine is required to be colored pink so that it cannot be mistaken for butter, and the regulation has been held to be constitutional, although the manifest mercantile effect of the regulation is the material discouragement of the trade in the product.1 On the other hand, in other States, manufacturers are simply prohibited from coloring oleomargarine so as to resemble butter; recognizing the fact that dairymen almost invariably employ annotto in coloring pure butter, in order to give it that well-known brilliant and pleasing color. In these States, the manufacturers are prohibited from using the same coloring matter, or from producing by any means in the oleomargarine the same color which is so commonly produced by annotto in pure butter. And the courts have pronounced this legislation to be a constitutional exercise of police power.2 A more moderate, and hence more reasonable, regulation of the sale of oleomargarine, is to be found in some of the States, which requires the purchaser to be notified in some way of the fact that he is buying oleomargarine. A very common regulation is to require the package to be wrapped up in paper, with the name, olemargarine, stamped or printed thereon in large letters.1 It has also been held to be constitutional for a State law to require, in the sale of substitutes for lard, that the substitute character of the compound should be indicated by a printed label or card.2 These decisions, relating to compound foods, may be accepted as proof positive that the judicial mind of this country is unalterably opposed to the proposed substitution for natural foods of chemically prepared pellets, containing in proper proportions the quantities of protein, fats and carbo-hydrates, which chemical analysis has declared to be required to sustain life in health and vigor.

Probably, it may be accepted as a constitutional limitation of the police power of the State in this connection, which will be generally recognized and enforced, that no State law of the kind just explained, regulating the sale of articles of food, will be enforcible against the original packages1 of interstate commerce, unless it can be shown that the object of the regulation is to prevent injury to the health of the public by the purchase of unwholesome food. At least, that was the conclusion of the Federal court in a case, involving the inquiry into the constitutionality of a State law, which made it a misdemeanor to sell baking powder, containing alum, unless the package have a label stating that the powder contained alum.2 Probably, the Legislature of New York had in view the protection of the public against the purchase of unwholesome, adulterated or inferior food, when it made it a misdemeanor for any person, who sells food, to give away therewith, as a part of the transaction of sale, any other thing of value as a premium or gift. But the New York Court of Appeals pronounced the law to be an unconstitutional interference with the liberty of contract, which was not justified by any legislative intention to protect the public from fraud or deception.3

It has been held to be a constitutional exercise of police power for the legislature to prohibit the sale, offer for sale, or having possession for the purpose of sale, of articles marked “sterling,” which do not contain 925/1000 parts of silver. The deception is so patent in that case, that it is difficult to see why the constitutionality of the law should be questioned.4 So, likewise, has it been held to be constitutional for a State law to

make it a misdemeanor to sell second-hand bottles, which have been stamped with the name of the original purchaser for his use in his business, without the consent of the owner of the stamp. And it is reasonable and constitutional for such law to make the possession of such bottles, by a dealer in second-hand bottles, prima facie evidence of his intention to sell them.1

In order to promote the interests and welfare of trade-unions and other associations of workmen, those whose members are employed in the manufacture of commercial commodities have adopted labels and trade-marks, which they attach to the goods which they manufacture, believing that, by enabling the public to distinguish union-made goods: i. e., goods made by the members of a trade-union, they thereby promote the interests of workingmen, and the development of trade-unions. Laws have been passed in a number of the States providing for the registration with the Secretary of State of these labels and trade-marks; and authorizing the union, when its label has been so registered, to enjoin its unauthorized use or counterfeiting by others, and recover damages; and, in some States, providing that the counterfeiting and misuse of the label shall be punishable as a criminal misdemeanor. Laws of this kind are to be found in New York, New Jersey, Illinois, and Missouri. The fact that some people, in each of these States, have considered it necessary or advisable to resist the enforcement of these laws, would indicate that these labels did exert some influence in trade in favor of union-made goods, sufficient to induce others to make an unauthorized use of them. The laws in question have been claimed to be unconstitutional, in that they enable a successful discrimination against workmen who are not members of a union. This principle has induced the New Jersey court to pronounce the law unconstitutional;1 but in the other cases, in which the constitutionality of the law has been questioned, the law has been sustained.2 The labor organizations have also secured legislation which is hostile to goods made by convicts, and requires that all such goods shall be labeled as convict-made. Inasmuch as the labor of the convict is a commodity which is owned by the State, there is probably no ground upon which the constitutionality of the law can be contested, so far as its provisions relate to the goods made in the penitentiaries of the State which enacts the laws; and do not have any retroactive effect, either upon goods already manufactured by convicts, or upon contracts already made by the State with manufacturers for the employment of the convicts. Any retroactive effect of that kind would undoubtedly be an unconstitutional interference with vested rights.3 To enforce such a law against goods made by convicts in other States, would be an unconstitutional interference with interstate commerce.4

A curious bit of legislation, evidently designed and so declared, to prevent fraud in the sale of goods, is a statute of Ohio, which provides that no vendor shall advertise, represent, hold forth, any sale as bankrupt, insolvent, etc., or closing out sale, or as a sale of goods damaged by smoke, fire, water, or otherwise, unless these facts are stated under oath in a communication to the Secretary of State, accompanied by a deposit of $500, and a license procured from the State and town in which he proposes to sell the goods so described and advertised. Its constitutionality has been sustained.1 But it would seem that the evil effects of the frauds aimed at are too insignificant to justify such severe regulations, which amount to a practical prohibition of such sales by any one but large dealers, and except when the goods are of considerable value.

A fruitful occasion for the practice of fraud and oppression is afforded in conditional sales, where provision is made for payment of goods purchased in installments, the vendor retaining title until the purchase price has been paid in full, and reserving the right to retake the property if there is a default in payment of any installment, without a repayment to the purchaser of any part of the money which has been paid on account. Statutes have been passed, requiring a return of the purchase-money in such a case, permitting the vendor to retain only a reasonable sum as compensation for the use of the goods. The constitutionality of this law has been sustained,2 and many of the courts, which have the equity powers of the English Court of Chancery, have, in the exercise of those powers, compelled a similar restitution of the purchase money, when the vendor exercised his contractual right to retake the goods.3

But where there is no danger of injury to the public, it is difficult to determine how far the State may by its police regulations attempt to protect private individuals against each other's frauds. A fraud is, of course, a trespass upon another's private rights, and can always be punished, when committed. It is therefore but rational to suppose that the State may institute any reasonable preventive remedy, when the frequency of the frauds, or the difficulty experienced in circumventing them, is so great that no other means will prove efficacious. Where, therefore, police regulations are established, which give to private parties increased facilities for detecting and preventing fraud, as a general proposition, these laws are free from all constitutional objections. Laws, which provide for the inspection and grading of flour,1 the inspection of tobacco,2 the inspection and regulation of weights and measures,3 the regulation of weight of bread,4 requiring all lumber to be surveyed, by a public surveyor,5 providing for the weighing of coal and other articles of heavy bulk on the public scales,6 are constitutional exercises of police power, so far as they permit one party to compel the other to comply with the regulation, in the absence of their agreement to the contrary. For example, it is permissible for a statutory regulation to provide for standard weights and measures, and to compel their use, when the parties have not agreed upon the use of others. But it cannot be reasonable to prohibit the use of any other mode of measurement.7 It is an excessive exercise of police power, when the law compels one to make use of the means provided for his own protection against fraud. The same distinction would apply to regulations, requiring the inspection and weighing of articles of merchandise by the inspector and weigher, and charging a certain fee for the same, even when the parties have agreed in good faith to waive the compliance with the regulation. There is only one ground, upon which this feature of such laws may be justified; and that is, to insure the State against the expense of maintaining a public inspection, and the provision will fall under the head of exceptional burdens or special taxation, which in some of the States is prohibited. But the authorities do not support this view of such regulations. The regulation is in most cases made absolute, and the observance of it is obligatory upon all. Thus it has been held that a city ordinance may require hay or coal to be weighed by city weighers.1 Of the same character, is the New York law, which provides that the sale of oleomargarine, or other product resembling butter, shall be prohibited, unless the box or other receptacle, in which it is kept, shall have the true name of the article plainly stamped upon it.2 The object of the law is the prevention of fraud and is a reasonable police regulation. Of a similar character is the law, which provides that druggists must, in the sale of all poisons, have upon the label of each package the word "Poison" printed in

clear type, the name of the poison and a statement of the ordinary antidotes. The regulation is a reasonable and justifiable one, and works no peculiar hardship upon the pharmacist. But the regulation of the sale of poison assumes an interesting and peculiar form, when it is extended, as it is in some of the States, to a requirement, that the druggist must keep a register of the poisons sold and the names of purchasers. Probably a double purpose is intended in the enforcement of this regulation, viz.: the prevention of suicide by checking the purchase of poison for such a purpose, and the prevention of homicide by poison, by facilitating the conviction in furnishing evidence of the purchase of poison. It is probable that the law is easily sustainable on either ground.3 While the common-law rule making suicide a crime and providing a certain punishment, may be open to serious constitutional objections,1 it is reasonable to suppose a man, who commits suicide, to be sufficiently insane to justify State interference, in order to prevent his infliction of bodily injury upon himself.2

[Back to Table of Contents]

§ 90.

Regulations To Prevent Fraud.—

In the preceding section, a number of regulations, for the purpose of preventing fraud in the sale of goods, wares and merchandise, have been explained, and their constitutionality elucidated. Fraud is of course hydra-headed, and threatens every business relation in life. And the only constitutional question, which can be raised, in respect to legislation which is designed to prevent and punish fraud in intra-State transactions, is whether the regulations go no farther than is necessary to prevent or punish the fraud, and do not infringe any vested rights, which can be enjoyed without the commission of the fraud. In this section, are included whatever regulations to prevent and punish fraud have been enacted, which do not specifically refer to sales of merchandise.

A very common regulation is that which requires the names of partners of a firm to be made public, so that the creditors of the partnership may know to what individuals they are giving credit. These regulations are varied in form; but in the main they are reasonable, and their constitutionality cannot be successfully contested.3

There is no business, in which popular confidence in the honesty and reliability of those engaged therein, and the protection against fraud and imposition, are so necessary to the public welfare, as those of banking and insurance. For that reason, we find in every State, officials, whose duty is to look into and superintend these businesses, so that a trusting and unsuspecting public may not be defrauded.

The State superintendent of banking has power to examine the books of any banking institution, operating under State laws, while the Controller of the Currency has the same power of control over national banks, which have been chartered under the national banking law. These officers are authorized and empowered to close up and force into liquidation all banks and bankers, who are found to have an impaired capital, or who are in an insolvent condition. So far as the author knows, the constitutionality of these regulations has been questioned in only one case; and in that case, their constitutionality has been sustained.1 A very common regulation of the banking business is that of making it criminal for any banker, or officer of a bank, to receive money or deposit when he knows that he or the bank is at the time in an insolvent condition. The constitutionality of this law has been sustained.2 The superintendence of the business of insurance is equally common, and in every State, officials have the power to refuse the right of doing business to any insurance company, whose financial condition does not comply with and satisfy the requirements of the State law. These laws, so far as it is known, have never been questioned. But in Pennsylvania, a statute makes it unlawful for a policy of insurance to be issued by any person, persons or firm or association, unless authority to do so is expressly conferred by a charter of incorporation. The constitutionalty of the law has been sustained.1

[Back to Table of Contents]

§ 91.

Legal Tender And Regulation Of Currency.—

Although Sociologists, like Herbert Spencer, may doubt the necessity, and condemn the practice, of the regulation of currency by the government; and although the private coining of money may be permitted without any detriment to the public interests, arising from the general debasement of the coin: no constitutional question can arise in respect to the exclusive exercise by government of the power to coin money in the United States; for the United States constitution gives to the national government this exclusive right.2 But apart from any special constitutional provision, and on general principles of constitutional law, this phase of police power may be justified on the plea of public necessity. The most devoted disciple of the *laissez faire* doctrine will admit that so delicate a matter as the determination of the standard value of the current coin can only be obtained by governmental regulation. In the colonial days, and in the days of the confederation, one of the greatest evils, and the most serious obstacle to commercial intercourse between the States, was the almost endless variety of coin that passed current in different places, and the difficulty was increased by the employment of the same names to denote, in different places, coins of different values. If the States and colonies could not, without the interference of the general government, procure for themselves coin of uniform value, it would be still more difficult for the commercial world to attain the same end. The only safe course is to vest in the supreme power—in this country, in the United States government—the exclusive control of the coin.

The necessity for a public coinage may not be so great as the State regulation of the value of the coins, but the danger of a general debasement of the coin, and the great possibilities of committing fraud upon persons who generally would not have the means at hand for detecting the fraud, would be a sufficient justification of the denial to private individuals of the right to coin money.

As already stated, in respect to the exclusive power of the United States, to coin money and to regulate the value thereof, no doubt can arise. But grave difficulties are met with, in determining the limitations upon the power of the government to declare what shall be a legal tender in the payment of debts. In fact, the governmental power to coin money is mainly incidental to the regulation of the matter of legal tender. Of course, the power to facilitate exchange by the creation of an ample currency does not necessarily involve the creation of legal tender. For example, national bank notes are currency, but they are not legal tender. But the need of a determination by law, what shall constitute a legal tender for the payment of debts, led inevitably to the demand for the creation of a sufficient quantity of the things, called money, which are required by law to be tendered in payment of debts. I do not mean to say that the demand for a legal tender preceded, in point of historical sequence, the need of a currency. But from the standpoint of police power, the necessity of a legal tender requires a

regulation of the currency of the government, instead of the latter bearing the relation of cause to the former.

Now, what can government declare to be a legal tender? There can be no doubt that the government has the power to declare its own coin to be legal tender. And it may, no doubt, provide that certain foreign coins shall be legal tender at their real value, as estimated by Congress; nor can it be doubted that the several States have no right to declare anything else but gold and silver to be a legal tender.1 But it is not an easy matter to determine the limitations of the power of the United States government, in the matter of legal tender. The question has assumed a practical form by the enactment of laws by Congress, in 1862, 1863, and 1878, declaring the treasury notes of the United States to be legal tender in payment of all debts, public and private. The acts of 1862 and 1863 were passed when the country was rent in twain by a gigantic civil war, which threatened the existence of the Union; and they were prompted by the desire to force the notes into circulation, and procure funds and materials for the prosecution of the war. In reporting the first act to the Senate, the chairman of the committee on finance (Sumner) said: "It is put on the ground of absolute, overwhelming necessity; that the government has now arrived at that point when it must have funds, and those funds are not to be obtained from ordinary sources, or from any of the expedients to which we have heretofore had recourse, and therefore, this new, anomalous and remarkable provision must be resorted to in order to enable the government to pay off the debt that it now owes, and afford circulation which will be available for other purposes."2 In other words, in order to furnish the government with the means, which the exigencies of war demanded, Congress made use of a power which is possessed by the government for promoting the welfare of the commercial world, by providing a uniform mode of settlement of debts. The establishment of a legal tender has for its object the bestowal of benefits upon the private interests of individuals, and was not intended to be a source of revenue. It cannot be doubted that this is the real object of a legal tender. The question then arises, can Congress employ this power for the purpose of increasing the revenue?

The question has been before the United States Supreme Court several times. In the first case,1 the acts of 1862-63, were declared to be unconstitutional in so far as they make the treasury notes of the United States legal tender in payment of existing debts. In the Legal Tender Cases,2 the opinion of the court in Hepburn *v.* Griswold, was overruled, and the acts of 1862 and 1863, in making the treasury notes legal tender, were declared to be constitutional whether they applied to existing or subsequent debts, the burden of the opinion being that Congress had the right, as a war measure, to give to these notes the character of legal tender. In 1878, Congress passed an act, providing for the re-issue of the treasury notes, and declared them to be legal tender in payment of all public and private debts. In a case, arising under the act of 1878, the Supreme Court has finally affirmed the opinion set forth in 12 Wallace, and held further that the power of the government to make the treasury notes legal tender, when the public exigencies required, being admitted, it becomes a question of legislative discretion, when the public welfare demands the exercise of the power.3 This decision will probably constitute the final adjudication of this question; and while it must be considered as settled, at least for the present, that the United States has the power to make its treasury notes legal tender, it is but proper that, in a work on

police power, the rule of the court should be criticised and tested by the application of the ordinary rules of constitutional law. The decision is so important, that full extracts from the opinion of the court, and the dissenting opinion of Justice Field, have been inserted in the note below.4

A perusal of the decisions in these leading cases will disclose the fact that the members of the courts, and the attorneys in the causes, have not referred to the same constitutional provision for the authority to make the treasury notes legal tender. Some have claimed it to be a power, implied from the power to levy and carry on war, others refer it to the power to borrow money, etc. If the power to make the treasury notes legal tender cannot be shown to be prohibited by the United States constitution, then there would be very little difficulty in determining the power of the government in the premises. The power to make and regulate legal tender being denied by the United States constitution to the States, the power must be exercised, if at all, by the United States government; and the United States government can exercise it, if the power is not prohibited by the constitution altogether, even though it is not expressly or impliedly delegated to the general government, at least if the position elsewhere taken1 in respect to the powers of the United States be correct.

But it is my opinion that, while the constitution of the United States does not prohibit Congress from making any other coins than gold and silver, legal tender, it does prohibit it from giving the character of legal tender to the United States treasury notes, or to anything else, which does not have and pass for, its intrinsic value. When gold or silver, or any other article of value is coined and is made a legal tender for the payment of all debts, at its true value, it is a very reasonable exercise of police power; for no one is deprived of his property against his will and without due process of law. It is merely a determination by law what coin is genuine, and which, therefore, was bargained for, by the parties to the contract. And when the value of the metal is inclined to be slightly variable from time to time, as in the case of silver, relative to gold, the establishment of a uniform value, when justly made, is likewise no unreasonable regulation. But if a money of a given denomination should be coined, of less value than existing coins of the same denomination, and the people were required to take them at their nominal value, it would be a fraud upon the people, and I can see no reason why such a law should not be declared unconstitutional. Congress has full power to change the value of coins from time to time, but no law is constitutional which compels the creditor of existing debts to receive these coins of less value, when the parties contemplated payment in the older coins of a higher value, but of the same denomination. If Congress should coin a dollar in gold or silver, whose intrinsic value was only eighty-five cents in existing coin, no law can compel its acceptance as equivalent to a dollar, worth one hundred cents. The enforcement of such a law would deprive creditors of fifteen per cent of their loans, without due process of law, and hence in violation of the constitution of the United States. Mr. Justice Gray says in Juillard *v.* Greenman,1 that such a law would not infringe any constitutional limitation, but it seems to me to be a plain violation of the constitutional provision, that “no man shall be deprived of his life, liberty or property, without due process of law.”

"Undoubtedly Congress has power to alter the value of coins issued, either by increasing or diminishing the alloy they contain; so it may alter at its pleasure their denominations; it may hereafter call a dollar an eagle, and it may call an eagle a dollar. But if it be intended to assert that Congress may make the coins changed the equivalent of those having a greater value in their previous condition, and compel parties contracting for the latter to receive coins with diminished value, I must be permitted to deny any such authority. Any such declaration on its part would be not only inoperative in fact but a shameful disregard of its constitutional duty. As I said on a former occasion: 'The power to coin money as declared by this court is a great trust devolved upon Congress, carrying with it the duty of creating and maintaining a uniform standard of value throughout the Union, and it would be a manifest abuse of the trust to give to the coins issued by its authority any other than their real value. By debasing the coins, when once the standard is fixed, is meant giving to the coins by their form and impress a certificate of their having a relation to that standard different from that which, in truth, they possess: in other words, giving to the coins a false certificate of their value."[1] But even in such a case, where a contract stipulates for the payment of lawful money, and the law should subsequently alter the value of the coin, so that the lawful money in use, when the contract is to be performed, is of less intrinsic value; and by construction of law the contract is supposed to refer to what is lawful money at the time of performance; there still may not be any absolutely arbitrary deprivation of private property. But when the government undertakes to make its own notes legal tender, a thing which has no intrinsic value, whose value as currency depends upon the public credit of the government, and rises and falls with it; instead of its being the reasonable exercise of a police regulation, the object of which is to facilitate exchange, and provide a satisfactory legal settlement of private obligations by providing a uniform currency of recognized value, it is an arbitrary taking of private property, compelling private individuals to become creditors of the government against their will.

Making the treasury notes legal tender is not induced by any desire to provide an easy method of making legal settlements of obligations, the only legitimate object of establishing a legal tender of any kind, but for the purpose of increasing the revenue of the government. The Supreme Court, in the opinion of Justice Gray, freely acknowledge this to be the purpose, and justify the exercise of the power by claiming it to be implied from the power to borrow money. This clearly is unjustifiable under any known rules of constitutional construction. The acts of 1862, and 1863, were justified as war measures, on the plea of necessity. It may be that the government of a country in a state of war, when its very existence is threatened, may compel its citizens to become creditors of the government. It may issue its treasury notes, and compel the creditors of the government of all classes to receive its notes in payment of its debts. It may, possibly, appropriate to its own use the materials necessary for the prosecution of the war, paying for them at their market value in its treasury notes. It may compel the citizens to serve in its land and naval forces, and be paid for their services in treasury notes. But it is difficult to see how it facilitates the borrowing of money by the government to make the treasury notes legal tender in the payment of debts between private parties. It has been claimed that the character of legal tender increases the purchasing power of the treasury notes. If this were so, it would be a faint justification of the law as a war measure. But it is not true. The purchasing

power of a government treasury note, or of any other paper currency, depends upon the popular confidence in its ready convertibility into specie. There is no difference in the purchasing power of treasury notes and national bank notes, although one is made legal tender and the other is not. Both are received as the equivalent of a gold or silver dollar, because of the confidence in the convertibility of both of them into coin; whereas, during the civil war, when many brave and true men were fearful of the result and the popular confidence in the durability of the United States government was greatly shaken; although the notes were made legal tender, they sunk steadily in value, until at one time, one dollar in gold was the equivalent of two and a half dollars in treasury notes. The treasury notes of the Confederates States fared worse, because their credit was impaired to a greater degree. Therefore, we must conclude that even as a war measure it was unconstitutional to make the treasury notes legal tender in payment of private debts, because it did not in any sense assist them in borrowing money or procuring money's equivalent, for the prosecution of the war.

It is probable that the latest decision of the Supreme Court on this subject will be treated by the present generation as final. But inasmuch as decisions of courts, even of last resort, do not make law, but are merely evidence, albeit the highest and usually the most reliable kind of evidence, of what the law is, it is the duty and within the province of jurists to combat error in decisions as in any other source of law, even when there is very little hope of a general adoption of their views.

[Back to Table of Contents]

§ 92.

Free Coinage Of Silver And The Legal Tender Decisions.—

In the national election of 1896, the chief issue before the people was the declaration of the democratic convention in favor of the free and unlimited coinage of silver dollars at the ratio to gold of 16 to 1. In a treatise on constitutional law, the subject deserves and requires consideration only so far as it involves a constitutional question. That it does involve a serious constitutional question the preceding section, on the power of the national government to regulate the currency, abundantly shows. The effort will be made here to show two things: *first,* that the legal tender decisions, which have been fully discussed in the preceding section, constitute a serious stumbling block to any effort to overturn by a judicial veto any act of Congress which provided for the free coinage of silver at any other than its true ratio of value with gold; and, *secondly,* that nevertheless, it might be reasonably expected that such an act of Congress would be declared to be unconstitutional by the Supreme Court of the United States.

One of the fundamental propositions of American constitutional law, which is expounded in many parts of this book, in application to a variety of police regulations, is that neither the national nor the State legislatures have the power by enactment to take one man's property and give it to another, even upon payment of compensation, except in the enforcement of the payment of debts. In the exercise of the right of *eminent domain,* a private owner's land may be taken for devotion to public use, upon payment of compensation. But it is not possible for land so condemned to be devoted to the strictly private use of another.

Property is defined as "any thing or object of value which one may acquire and own," and one of the commonest divisions of property in the law books is into things in possession and things in action. Things in action, or, to employ the old Norman-French term, *choses in action,* include every claim against another for money, or money's equivalent, which can be successfully enforced in a judicial action. It is manifest, therefore, that the constitutions, both national and State, guarantee one in the secure possession of things in action, as well as of things in possession. When the National Bankrupt Law, which cut off the claims of creditors of an insolvent debtor, was claimed to be a violation of the right of property in things in action, it was justified on the ground that the constitution of the United States had expressly authorized the enactment of the law, thereby making it an express exception to the ordinary constitutional guaranty of protection to vested rights.[1]

It is probably not an exaggerated statement that three-fourths of the private property of the world are things in action, contracts, bonds, notes, open accounts, covenants, mortgages, etc., and the great majority of these things in action are contracts, which call for the payment of money. It is also probably true, that the overwhelming majority of these current monetary obligations were created in this country since

1873, when Congress demonetized silver, and put the country distinctly on a gold basis. These current monetary obligations were, therefore, made on a gold basis; *i. e.,* when the bond or note, called for the payment of one thousand dollars, both debtor and creditor are conclusively presumed to have had in contemplation the payment of something, which, under the denominations of dollars and cents, would have enabled them to buy in the markets of the world the value in goods of the amount of gold which was put by the United States Government into one thousand gold dollars. If these parties had anticipated that, when the debt fell due, the debtor could extinguish his debt of one thousand dollars in gold by the transfer of five or six hundred gold dollars' worth of silver—which would enable the creditor to buy in the markets of the world only a little more than half the quantity of goods that he could get with the one thousand gold dollars, which he had expected to realize from the contract—the terms of the contract would certainly not have been the same. Common sense, as well as the expressed judicial opinion of this country in analogous cases, with the exception of the legal tender decisions, would force us to the conclusion that an act of Congress, passed subsequently to the making of the contract, which required the creditor to take five hundred gold dollars' worth of silver, whether in bullion or coined into silver dollars at the ratio of sixteen to one, would have the effect of taking away from the creditor one-half of his property, by reducing its purchasing power by one-half; and, that, for that reason, such an act of Congress was in violation of the fifth amendment of the national constitution, which prohibits the taking of private property without due process of law.

It might be urged that the silver dollar of the present weight and fineness is already, and has been since 1878, legal tender in payment of all debts, public and private; and that the free coinage of silver dollars at the same ratio would not change the rights of parties to existing private contracts. To this contention the answer may be given that, inasmuch as silver is coined, under the act of 1878, and subsequent acts, in limited quantities only, the silver dollar has the character and effect of subsidiary coin, particularly since the government has uniformly given to the holder of treasury notes gold dollars, whenever they were demanded, and receive silver and gold dollars indiscriminately, in payment of debts to the government. In other words, the United States Government's guaranty that the silver dollar shall be maintained on a parity with the gold dollar, substantially makes the silver dollar as much a subsidiary coin as the fractional currency, whose intrinsic value is below the nominal value. This guaranty of the government alone maintains this parity; but if the guaranty were to be made worthless, as it would by a provision for the free coinage of silver, the gold would disappear from circulation, as it did in 1834, and the country would at once settle down to a silver basis, resulting in a practical repudiation of about fifty *per centum* of existing obligations, unless the United States Supreme Court intervened with the declaration that this is a taking of private property without due process of law, which is inhibited by the national constitution.

It is a common rule of private conduct, that where one, even for a laudable purpose, does an act, which is in violation of a fundamental principle of ethics and justice, the incidental injurious consequences far outweigh in effect the good, or supposed good, which is immediately attained. And this is strikingly true with the declarations by the Supreme Court of the United States that Congress had the power to declare the United

States treasury notes to be legal tender in payment of public and private debts. Those, who are not familiar with the opinions, filed in these cases, will be surprised to learn that Justices Strong and Gray, in delivering the opinion for a majority of the court, in 12 Wallace, 457, and 110 U. S. 449, have plainly asserted the power of Congress to debase the currency, and make the debased currency legal tender in payment of existing obligations. In the legal tender cases,[1] the court say:—

"The obligation of a contract to pay money is to pay that which the law shall recognize as money when payment is to be made. * * * No one ever doubted that a debt of $1,000, contracted before 1834, could be paid by 100 eagles coined after that year, though they contained no more gold than 94 eagles such as were coined when the contract was made, and this *not because of the intrinsic value of the coin, but because of its legal value.* * * * Every contract for the payment of money simply, is necessarily subject to the constitutional power of the government over the currency, whatever that power may be, and the obligation of the parties is therefore assumed with reference to that power. * * * It is thus clear that the power of Congress may be exercised, *though the effect of such exercise may be in one case to annul and in other cases to impair the obligation of contracts.*"

In the same case, Mr. Justice Bradley says: "The mere fact that the value of debts may be depreciated by legal tender laws is not conclusive against their validity." And in Juillard *v.* Greenman,[1] Mr. Justice Gray, in delivering the opinion of the court, said:—

"So, under the power to coin money and to regulate its value, Congress may (as it did with regard to gold by the act of June 28, 1834, and with regard to silver by the act of February 28, 1878, ch. 20) issue coins of the same denomination as those already current by law, but of less intrinsic value, or containing less weight of the precious metals, *and thereby enable debtors to discharge their debts by the payment of coins of less value.*"

Notwithstanding these very plain assertions of the power of Congress to debase the currency, by the modern imitation of the medieval practice of clipping coins, I will make the effort to prove that the opinions of Justices Strong, Bradley and Gray are not indicative of what would be the judgment of the Supreme Court on the constitutionality of a free coinage silver act.

First. The opinion as to the power of Congress to debase the currency was only a *dictum,* and appears in cases which hold that the Congress could make United States treasury notes legal tender. While I believe that the court erred in reaching that conclusion, the making of a legal tender out of treasury notes was only an incidental debasement of the currency, inasmuch as the notes were payable in coin, and the discount in the current valuation of the notes, due to the stress of war and its subsequent effect on the credit of the government, was only temporary. I am also fully persuaded that the legal tender decisions would never have been delivered, had it not been that a very large and powerful class of people, who had made debts in reliance upon the legality of the legal tender acts of 1863, would have been seriously injured,

if not ruined, by a decision of the court, that the treasury notes were not legal tender. In the beginning of his opinion in 12 Wallace, 457, Mr. Justice Strong said:—

"It is also clear that, if we hold the acts invalid as applicable to debts incurred or transactions which have taken place since their enactment [the legal tender acts of 1863], *our decision must cause throughout the country great business derangements, widespread distress and the rankest injustice.* The debts, which have been contracted since February 25, 1862, constitute by far the greatest portion of the existing indebtedness of the country. They have been contracted in view of Congress declaring treasury notes a legal tender, and in reliance upon that declaration. Men have bought and sold, borrowed and lent, and assumed every variety of obligations contemplating that payment might be made with such notes. *Indeed, legal tender treasury notes have been the universal measure of value.* If now, by our decision, it be established that these debts and obligations can be discharged only by gold coin; if, contrary to the expectation of all parties to these contracts, legal tender notes are rendered unavailable, *the governmenthas become the instrument of the grossest injustice; all debtors are loaded with an obligation it was never contemplated they should assume; a large percentage is added to every debt, and such must become the demand for gold to satisfy contracts, that ruinous sacrifices, general distress and bankruptcy may be expected.*"

Can there be much doubt that if Mr. Justice Strong and his colleagues, who sustained the constitutionality of the legal tender acts, were now called upon to declare an act of Congress to be constitutional, which will compel creditors to receive in payment of existing debts money having only one-half the purchasing power of the present gold standard, they would be just as profoundly impressed with "the rank injustice" of such an enactment? As the late Austin Abbott used to say, the business of the judge is to give a legal reason for the conclusions of common sense; and I may add that, while the legal reason is usually considered as controlling the judgment of the court, the judgment is really dictated by the conclusions of common sense. These conclusions of common sense, rather than the assigned legal reasons, must be considered in attempting to forecast the decision of the same court in analogous cases. In this connection I make bold to say that the quotation just given from the opinion of Mr. Justice Strong is a better guide to the determination of the social forces which brought about the legal tender decisions than the legal reasons assigned by him and his colleagues; as well as a better index of what the judgment of the court would be on the constitutionality of a silver free coinage act.

In the legal tender cases, the debtor class was in danger of being subject to "rank injustice" by declaring the legal tender acts unconstitutional; while under a silver free coinage act the creditor class would be the sufferers of "rank injustice," if the bill was held to be constitutional.

Secondly. When the legal tender acts were first passed, the nation was in the throes of a gigantic civil war, and the permanency of the Union hung in the balance. It was as a war measure that the legal tender acts were first adopted; and while, in Juillard *v.* Greenman,[1] the necessity of claiming the power to make treasury notes legal tender, as a war measure, was not present, and the court really sustained the legal tender act

of 1878, which continued the legal tender character of treasury notes and provided for their reissue, on the technical ground that, conceding to the government the power to make its treasury notes legal tender, it was a legislative and not a judicial question when it was necessary to exercise the power, underlying all these legal tender decisions is the profound though, in the judgment of many, the mistaken conviction that the exercise of that power in 1863 was of immediate service to the national government in overthrowing the Southern Confederacy; and that it would be unwise to deny to the government a power which, however dangerous it might be if employed unwisely, was held to be highly beneficent in times of great emergency. No such special plea could be urged in behalf of the free coinage of silver. The duration of the government is not to be promoted, but rather endangered, by such an enactment. The only end to be attained by such a measure, in addition to the heavy percentage of repudiation of all existing obligations, is the speculative gain from the establishment of a different standard of valuation for future contracts. Such an end would not justify the government's interference with the obligations of debtors on existing contracts.

Thirdly. The legal reason, which led Justices Strong and Gray to the statement that Congress could debase the currency without violating any provision of the United States constitution, was based upon what Mr. Justice Strong asserted to be an uncontroverted and uncontrovertible proposition of law that an ordinary contract to pay a certain number of dollars "was not a duty to pay gold or silver, or the kind of money recognized by law at the time when the contract was made, nor was it a duty *to pay money of equal intrinsic value* in the market. * * * The obligation of a contract to pay money is to pay that which the law shall recognize as money when payment is to be made."

And in Juillard *v.* Greenman,[1] Mr. Justice Gray said:—

"A contract to pay a certain sum in money, without any stipulation as to the kind of money in which it shall be paid, may always be satisfied by payment of that sum in any currency which is lawful money at the place and time at which payment is to be made."

I think it can be demonstrated that this is not American law, so far as it is claimed to involve the power of the government to debase the currency, and to compel the existing creditor to take in payment of his existing claim a depreciated or debased currency at its face value. The foreign authorities, which are cited by these judges, need not be taken into consideration; because nowhere else in the world is a court authorized or enjoined to avoid a legislative act on any ground whatever. When, however, we read this proposition of the law of contracts, in the light of Faw *v.* Marsteller,[2] cited by Mr. Justice Strong, in support of his proposition, that the government can debase the currency without violating existing contracts, we are forced to the conclusion that its only meaning, as a proposition of American law, is that the creditor is obliged to take in payment of his claim, whatever is rightfully made legal tender at the time that the debt falls due. For example, it is a common proposition of commercial law that a negotiable promissory note may be made payable in this country, calling for the payment of a sum of money of a foreign denomination, but it is actually payable in the legal tender of this country, unless

otherwise agreed upon; and the amount in the legal tender of this country, which is due on the note, is computed from the relative values of the units of the two systems of coinage. The commercial world holds, as the fundamental unit of value, to the purchasing power of the denomination. And while the government of the United States may vary the intrinsic value of its coins, and therewith change their ratio of value with foreign coins, it has not the constitutional power to increase or diminish the purchasing power of the money called for in settlement of an existing contract. This seems to be the irresistible conclusion from the opinion of Chief Justice Marshall in Faw *v.* Marsteller.1

During the revolutionary period of our existence as a nation, each of the States, as well as the Continental Congress, had issued paper money or treasury notes, in such large sums, that this money had become greatly depreciated in value, and a proportionate premium had to be paid for gold and silver. Although there was a general expectation that at some time in the future the depreciated paper would be retired, and specie payment be resumed, most contracts were made in the expectation that they would be performed by payment in this depreciated currency.

The Virginia Legislature, along with provision for resumption of specie payment, had established a scale of valuation of the depreciated paper money in specie at different periods of its circulation, and declared that contracts, which had been made during the circulation of the paper money, when paid in specie, should be reduced in amount to the real value which the paper money had in specie at the time when the contract was made. For example, a contract calling for the payment of $1,000, made when the paper money was worth in specie only fifty cents on the dollar, the creditor could only recover $500 in specie.

In the case of Faw *v.* Marsteller, a deed of sale was made in 1779 of land upon a perpetual ground-rent of 26 pounds *current money of Virginia.* It was contended by the grantor's assigns that this contract did not come within the statute, because it was a continuing contract, and that the rentals falling due after the resumption of specie payment, should be construed as obligations arising after that date, and that these rentals should be paid in full in specie. Chief Justice Marshall denied this claim, holding that the contract did come within the operation of the statute. The Chief Justice said, continuing:—

"It seems to be the date and not the duration of the contract which was regarded by the Legislature. The act is implied directly to the date of contract, and the motive for making it was that contracts entered into during the circulation of paper money, *ought in justice to be discharged by a sum different in intrinsic value from the nominal sum mentioned in the contract, and that when the Legislature removed the delusive standard, by which the value of the thing acquired had been measured, they ought to provide that justice should be done to the parties.*"

The Virginia Legislature had, however, provided in the act referred to, that where the scale in values proved in any particular case to work injustice, the courts were empowered to make a special inquiry into the value in specie of the claim in the particular contract, and that this judgment of the court should determine the amount to

be paid in liquidation of the contract. Chief Justice Marshall held, from the evidence before him, that this was one of those extraordinary cases, which were not justly provided for by the scale of values, and ordered a special inquiry to determine the annual rental value in specie of the land at the time when the land was sold. Surely the great exponent of the sanctity of contracts would not have rendered this decision, had he believed in the power of the government to change the intrinsic value of the unit of money, and compel parties to existing contracts to receive in payment the debased coin at its face value. In the light of the facts of this case, and the specific judgment of the court, the statement of Chief Justice Marshall in his opinion in the same case,1 which is quoted by Mr. Justice Strong in the legal tender cases, that "according to the law of contracts all moneys accruing under it, which were not received during the currency of paper, would be payable in such other money as might be current at the time of payment," must be taken to mean only that the creditor cannot object to the *kind* of money offered in payment, because it was not money at the time when the contract was made.

The same principles controlled the United States Supreme Court in laying down the rule that where, during the prevalence of the civil war, a note or contract was made in the Southern States within the Confederate lines, calling for the payment of a number of dollars, and which remained unpaid at the re-establishment of peace, the sum payable in the lawful money of the United States on such a note must be ascertained by the determination of the value in such money of the Confederate currency at the time and place, when and where such note or contract was made.2

The fact that the same court rendered these decisions at the same time that they were deciding the legal tender cases, indisputably sustains my contention that the legal tender cases are not to be taken as a judicial determination, that the United States Government can impair the obligation of existing contracts by compelling, in performance of such contracts, the receipt of a debased currency at its face value.

Fourthly. The dicta of these justices are still further weakened by their claim that the United States Government had reduced the intrinsic value of its coin, and thus impaired the obligation of existing contracts in 1834. The latter half of the proposition is not true.

Under the act of 1792, the silver dollar was established as a unit of value in the ratio to gold of 15 to 1; but by 1823, it became very plain that the true ratio was 16 to 1. As a result of this depreciation of silver, the gold passed out of circulation and was either sent to Europe or hoarded in this country. Inasmuch as both silver and gold were legal tender, and the debtor could pay his contracts in either coin, he would surely pay in the cheaper metal. At that time, therefore, this country was on a silver basis, and all the existing contracts were made in reliance upon payment in silver. The creditor gained nothing, therefore, from this relative appreciation of the gold dollar. The only one who profited by it was the possessor of the gold dollar, and his profit depended solely upon the extra quantity of gold in the gold dollar. Inasmuch as the country was already on a silver basis, in re-establishing a parity between the two metals, Congress acted wisely in reducing the quantity of gold in the gold dollar, because it was the scarcer coin, and had already passed out of active circulation. Values were in nowise

disturbed by this Congressional enactment; they would have been if the intrinsic value of the silver dollar had been increased, for all contracts were then made on a silver basis. The situation is now completely changed. We are on a gold basis, and the terms of all contracts are determined by a reference to the gold standard. The remonetization of silver at a ratio which would make the silver dollar inferior in intrinsic value to the gold dollar would at once take us to the silver basis, and the values of all monetary obligations would be proportionately reduced.

This exposition seems to make clear that while the legal tender cases would, as prominent precedents, have proved stumbling-blocks in the way of securing a declaration that a silver free coinage bill was unconstitutional, so far as it applied to existing contracts; such a declaration might have been confidently expected, if the court had been called to pass upon the question.

[Back to Table of Contents]

§ 93.

Legislative Restraint Of Importations—Protective Tariffs.—

The reader, who has carefully followed the line of argument adopted, and the tests applied, in each case of the exercise of police power, will scarcely need any special elaboration of the grounds upon which it is held to be a violation of civil liberty for the government to do any act which is intended to and does restrain importations. Whatever may be thought of the justice of an import tax, in the abstract, the United States constitution expressly grants to the United States government the power to lay such a tax upon all importations. A tariff for revenue, therefore, comes within the legitimate exercise of police power. It is one mode of taxation. But no claim can be successfully made to an express or implied power to establish a tariff whose object is to restrain importations for the protection of competing home industries. The only provision on the subject is article 1, section 8, where it is provided that Congress shall have power "to lay and collect taxes, duties, imposts, and excises to pay the debts and provide for the common defense and general welfare of the United States." Here is found only an authority to establish a tariff for revenue. In the days when the constitutionality of tariff laws used to be discussed, it appears to have been conceded by the abler statesmen, that there was no authority in the constitution for creating a tariff for protection, and the claim was usually made that they may establish "a tariff for revenue with incidental protection." This is clearly an inconsistency. A tariff for revenue, when carried to its logical extreme, would involve the institution of a policy, which would encourage importations, and discourage home manufactures, for the greater the imports the larger will be the revenue. On the other hand, the principle of protection, when pushed to its extremity, would restrain importations, and, if possible, the tariff would be so constructed that there would be no imports, and hence no revenue. While a tariff for revenue so constructed as to operate as an intentional restraint upon home industries would not be just or wise, all tariffs should be constructed with the single object in view of raising revenue, and so far as there is any attempt to afford the so-called incidental protection, Congress exceeds the express power to lay imposts.

But, in accordance with the rule of constitutional construction advocated and explained in a subsequent section,[1] since the States are denied the power to lay imposts or duties upon imports, "without the consent of Congress," "except what may be absolutely necessary for executing its inspection laws,"[2] we claim that Congress may, without express grant of such a power, lay imposts for the purposes of protection, if the constitution does not prohibit it. But we also claim that a tariff for protection is prohibited by the constitution, not in express terms, but by the general clause which provides that no one shall "be deprived of life, liberty or property, without due process of law."[3] It would be as constitutional for a State to prohibit one class of citizens from trading with another, as it is for the United States to prohibit, totally or partially, the dealing of citizens with foreign countries. It is a part of the civil liberty of a citizen of a constitutional State to be permitted to have business

relations with whom he pleases. Even though a protective tariff does not compel the consumer to pay more for the home products than he would have to pay for the foreign articles in the absence of a protective tariff, and the home products were of the same value and intrinsic merit, protection is unconstitutional, because it interferes with the civil liberty of the citizen, when he is not threatening any evil to the public. But protective tariffs are usually needed, either because it is impossible to manufacture the home products as cheaply, or because they are of an inferior character. Hence, the consumer is made to pay more for his goods, and the tariff furthermore deprives him of his property, without due process of law. Without express constitutional authority, nothing but free trade is permissible under a constitutional government and in a free State.

[Back to Table of Contents]

§ 94.

Liberty Of Contract, A Constitutional Right.—

As an abstract proposition, it would be nowhere questioned that the right to make whatever contract one pleases is guaranteed by all the American constitutions, Federal as well as State; at least, by necessary implication from the constitutional guaranty that no man shall be deprived of liberty or property, except by due process of law. Nor is it necessary, under the prevalent rules of constitutional interpretation and construction, to rely upon any unwritten law: for, while the phrase, freedom or liberty of contract, is not to be found in the bill of rights of any American constitution, in almost all of them the right to acquire and possess property and to pursue happiness is declared to be inalienable. And this it has been rationally declared "includes the right to make reasonable contracts, which shall be under the protection of the law."[1]

In all the constitutions of the United States, it is substantially declared that "no man shall be deprived of his life, liberty and property, except by due process of law" (sometimes "except by the judgment of his peers and the law of the land"). And one's liberty, as well as property, is infringed, if his liberty to make reasonable contracts is taken away or restricted by unreasonable regulations. But, here, as elsewhere in the discussion of the subject of police power, this constitutional liberty of contract is not conceded to be absolutely free from all legislative restraint. Such a condition would cause this liberty by degenerating into an unrestrained license, to become a serious menace to the safety and welfare of the public, or to threaten trespass upon the just rights of other individuals. From time immemorial, it has not been lawful for one to make a contract for the commission of a crime, or for the violation of any law or trespass upon any one's rights. It has never been lawful to contract for the commission of a fraud, or to commit fraud in the making of a contract. And now, with the extension of the scope and application of the police power in the furtherance and protection of public and individual welfare, which progresses with the increase in the popular knowledge of public affairs; we find regulations, which more or less limit or restrict liberty of contract, rapidly increasing. And the courts are being constantly called upon to declare what regulations of this kind are reasonable or unreasonable, and hence constitutional or unconstitutional. In the next succeeding sections, a variety of these restrictions upon liberty of contract will be explained and their constitutionality or unconstitutionality expounded in the light of the adjudications.

[Back to Table of Contents]

§ 95.

Compulsory Formation Of Business Relations—Common Carriers And Innkeepers Exceptions To The Rule—Theaters And Other Places Of Amusement.—

It is a part of civil liberty to have business relations with whom one pleases. Judge Cooley says: "It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice or malice."1 Business relations must be voluntary in order to be consistent with civil liberty. An attempt of the State to compel one man to enter into business relations with another, can only be justified by some public reason or necessity. In an ordinary private business relation, the State cannot constitutionally interfere, whatever reason may be assigned for one's refusal to have dealings with another. It is no concern of the State or of the individual, what those reasons are. It is his constitutional right to refuse to have business relations with a particular individual, with or without reason. But there are cases in which it has long been held to be within the scope of legislative authority to interfere with, and compel, the formation of business relations. The common law of England, and of this country, has for centuries justified this power of control over common carriers and innkeepers. No man is compelled to become a common carrier or innkeeper; but if he holds himself out to the world as such, he is obliged to enter into business relations with all, under impartial and reasonable regulations. The common carrier must carry for all, within his regular line of business, and the innkeeper must provide accommodation for all who come to him, as long as he has room for them. These two cases have for so long a time been recognized as exceptions to the general rule, in respect to the voluntary character of business relations, that the reasons for them are rarely, if ever, demanded, and certainly not questioned. But a determination of the constitutional reasons for these exceptions, if there are any, will help to discover the limitations of legislative power in respect to other kinds of business. It is stated usually, that the business of a common carrier is a *quasi* public business, meaning that the public have some rights in it, as, for example, the right to a compulsory formation of business relations, which they do not possess in respect to a purely private business. But that is rather a statement of what is, rather than a reason for its existence. A similar statement is usually made in regard to the peculiar liability of innkeepers, and ordinarily deemed sufficient. But if this regulation of the business of a common carrier, and of an innkeeper, is justifiable under our constitutional limitations, there must be some good public reason for the regulation, and not merely a matter of public convenience. Where the common carrier enjoys, in the prosecution of his business, unusual privileges or franchises, as in the case of railroads, ferries, street car companies and the like,1 one need not go further for a reason to justify such a police regulation. Since the State grants the common carrier a privilege, not equally enjoyed by others, for the promotion of the public convenience, it might very well arrange for the impartial carriage of all, under reasonable regulations. And inasmuch as the common carriers,

who do not have any special privileges, like hackmen, draymen, and drivers of express and furniture wagons, make a special use of a general privilege, in plying their trade, it may not be unreasonable for the State to compel them to carry all who may offer themselves or their goods. But no such reasons can be assigned for a similar regulation of innkeepers. They enjoy no privileges of any kind. Every man has a natural right to keep an inn, provided he so conducts it as not to violate the rights of others, or to constitute a public nuisance. If the business was of such a nature, that for the protection of the public from injury it is necessary to make a monopoly and grant it to one or more, as a special privilege,2 then it would be the duty of the State to provide for the impartial entertainment of all who present themselves, and comply with the reasonable regulations of the inn. But the inn is no more likely to be productive of public injury than is the boarding house, from which the inn is distinguished. The keeper of a boarding house is not obliged to receive as a guest any one who comes. The threatening danger to the public, arising from the improper conduct of the inn, is, therefore, not the reason for the rule of law, which obliges the innkeeper to receive as his guest, any traveler of decent behavior, who may apply. The object of the rule is to make it convenient for travelers to find lodging upon arriving in a strange place. It is a worthy object, but no man can be compelled to lodge another, simply because he is a traveler, and a stranger. No sufficient reason can be assigned; unless the reason, given by Chief Justice Waite in a later case,1 may be accepted as a proper one. He says: "Looking to the common law, from whence came the right which the constitution protects, we find that when private property is affected with a public interest, it ceases to be *juris privati* only. This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise De Portibus Maris, 1 Harg. Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest, when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use, but, so long as he maintains the use, he must submit to the control."2 In this case, the business in question was the storage of grain in bulk in the Chicago elevators. As applied to the particular case, the rule thus laid down by Chief Justice Waite would give to the legislature the right to regulate any business, which should become a public necessity. The public utility of the business clothes it with a public interest, and authorizes police regulation to prevent imposition or oppression where the business becomes a *virtual* monopoly.1 It is unquestionable that the State can, and indeed it is its duty to, subject to police control a monopoly, created by law; but in this case it is laid down for the first time that where the circumstances, surrounding a particular business, or its character, make it a "virtual monopoly," the State can regulate the conduct of the business, so that all having concern in it, will be treated impartially and fairly. I say this rule has been laid down for the first time, although the chief justice refers to it as a long established rule, and refers to Lord Hale as his authority. A careful study of Hale's writings will disclose the fact that to no case does he refer in which the business does not under the law constitute a privilege, more or less of a legal monopoly. There is nothing in his writings to justify the application of his rule

or his reasoning to a business, which is a virtual monopoly, but is not made so by law.1

But even this is not a satisfactory reason for compelling all innkeepers to receive all guests applying to them at the present day. Perhaps at an early day, when the number of travelers was limited, and was not large enough to support more than one inn in most places, innkeeping may have been a virtual monopoly. But that town is very small, in this country, which cannot boast of at least two inns, and the actual rivalry and competition to secure guests will dispel all notions of a virtual monopoly. No reason but public convenience can be suggested for the existence of this law in respect to innkeepers, and it is by no means a satisfactory one. The public convenience can never justify the interference of the State with one's private business.

Of late a disposition to bring within this category the theaters and other places of public amusements has been displayed by legislatures, both State and national, in order to prevent discrimination by the managers and proprietors of such places against the negro, "on account of his race, color, or previous condition of servitude." The United States statute, which has lately been declared to be unconstitutional, because the law encroaches upon the domain of the State legislatures,2 and which corresponds in all essential particulars to the State statutes on the same subject, provided "that all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public conveyances on land and water, theaters and other places of public amusement, subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude." So far as these statutes refer to the enjoyment of the privileges of inns and public conveyances, they merely affirm the common law, and grant no new right. But in respect to theaters and other places of public amusement, the regulation is certainly novel. The only legal reason for the regulation is public convenience, unless the circumstances are such that the business becomes a virtual monopoly. And to justify the regulation on these grounds is certainly, going very far toward removing all limitation upon the power of the State to regulate the private business of an individual. In the Supreme Court case,1 Chief Justice Waite justifies the police control of "a virtual monopoly," on the ground that the use of the elevator is a public necessity to all merchants, who are engaged in the shipment of grain through Chicago to all points of the country. So, also, may the entertainment at an inn be considered a public necessity to all travelers. But attendance upon theatrical and other public amusements can in no sense be considered a necessity, nor is the business a franchise or legal monopoly. Such legislation should, therefore, be condemned as unconstitutional. But it has been sustained in some cases against all objections,2 and Judge Cooley justifies it in the following language: "Theaters and other places of public amusement exist wholly under the authority and protection of State laws; their managers are commonly licensed by the State, and in conferring the license it is no doubt competent for the State to impose the condition that the proprietors shall admit and accommodate all persons impartially. Therefore, State regulations corresponding to those established by Congress must be clearly within the competency of the legislature, and might be established as suitable regulations of police."1

In a recent case, in which an alien seaman was forced to ship in an American vessel against his will, and in the absence of any contract, it was held that his forced service on the ship was violative of the thirteenth amendment of the United States Constitution.2

[Back to Table of Contents]

§ 96.

Regulation Of Prices And Charges.—

A most interesting question, somewhat like, and resting upon the same grounds as the one discussed in the preceding section, is the right of the government to regulate prices and charges for things and services. The exercise of this power was quite common in past ages; and there appeared to be no well defined limitations upon the power, if any at all were recognized. But under a constitutional and popular government, there must necessarily be some limitation. It is a part of the natural and civil liberty to form business relations, free from the dictation of the State, that a like freedom should be secured and enjoyed in determining the conditions and terms of the contract which constitutes the basis of the business relation or transaction. It is, therefore, the general rule, that a man is free to ask for his wares or his services whatever price he is able to get and others are willing to pay; and no one can compel him to take less, although the price may be so exorbitant as to become extortionate. No one has a natural right to the enjoyment of another's property or services upon the payment of a reasonable compensation; for we have already recognized the right of one man to refuse to have dealings with another on any terms, whatever may be the motive for his refusal. But there are exceptions to the rule which can be justified on constitutional grounds. This general freedom from the State regulation of prices and charges can only be claimed as a natural right so far as the business is itself of a private character, and is not connected with, or rendered more valuable by, the enjoyment of some special privilege or franchise. Whenever the business is itself a privilege or franchise, not enjoyed by all alike, or the business is materially benefited by the gift by the State of some special privileges to be enjoyed in connection with it, the business ceases to be strictly private, and becomes a *quasi* public business, and to that extent may be subjected to police regulation. A special privilege or franchise is granted to individuals because of some supposed benefit to the public, and in order that the benefit may be assured to the public, the State may justly institute regulations to that end. The regulation of prices in such cases will, therefore, be legitimate and constitutional.[1]

But the regulation of prices will not be justified in any case where the law merely declares the prosecution of the business to be a privilege or franchise. If it be without legislation a natural right, no law can make it a privilege by requiring a license. The deprivation of the natural right to carry on the business must be justifiable by some public reason or necessity. Otherwise the general or partial prohibition is unconstitutional and furnishes no justification for the regulation of prices and charges, incident to the business.[1]

But some of the courts are inclined to extend the exercise of this power of control to other cases, which do not come within the classes mentioned, viz.: those in which no special privilege or franchise is enjoyed, and in which there is no legal monopoly, but in which the circumstances conspire to create in favor of a few persons a virtual

monopoly out of a business of supreme necessity to the public. The leading case is that of Munn *v.* Illinois, already mentioned in the preceding section.2 It has so important a bearing upon the question under discussion, that we will quote again Chief Justice Waite's statement of the rule laid down in that case. He says: "Looking, then, to the common law, from whence came the right which the constitution protects, we find that when private property is 'affected with a public interest, it ceases to be *juris privati* only.' This was said by Lord Chief Justice Hale, more than two hundred years ago, in his treatise *De Portibus Maris,*3 and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control."1 Although the application of these principles to the case in question only constitutes a precedent for justifying the regulation of prices in those cases, where the business is a virtual monopoly and of great necessity to the public,2 yet the language is broad enough to justify almost any case of regulation of prices. Under this rule, the attainment of the object of all individual activity, viz.: to make oneself or one's services indispensable to the public, furnishes in every case the justification of State interference. Only the more or less unsuccessful will be permitted to enjoy his liberty without governmental molestation. We feel with Mr. Justice Field, who dissents from the opinion of the court, that "if this be sound law, if there be no protection, either in the principles upon which our republican government is founded, or in the prohibitions of the constitution against such an invasion of private rights, all property and all business in the State are held at the mercy of a majority of its legislature."3 For the same reasons, we find the Supreme Court of Alabama justifying an act of the legislature which authorized the town council of Mobile to license bakers, and regulate the weight and price of bread. In declaring the act to be constitutional, the court said: "There is no motive, however, for this interference on the part of the legislature with the lawful actions of individuals or the mode in which private property shall be enjoyed, unless such calling affects public interests, or private property is employed in a manner which directly affects the body of the people."

"Upon this principle, in this State, tavern keepers are licensed and required to enter into bond, with surety, that they will provide suitable goods and lodgings for their guests, and stabling and provender for their horses. The county court is required, at least, once a year, to settle the rates of innkeepers, and upon the same principle is founded the control which the legislature has always exercised in the establishment and regulation of mills, fences, bridges, turnpike roads and other kindred subjects."1

Chief Justice Waite relies upon Lord Hale as an authority for his recognition of the rule as of common-law origin. But there is nothing in Lord Hale's writings to support the broad application which the Chief Justice makes of his language. In every case to which Lord Hale applies this doctrine, there is a grant of a special privilege or franchise, and the enjoyment of it is regulated by law so that the public may derive from it the benefit which constituted the consideration of the grant. Thus, in respect to

ferries, he says, the king "has a right of franchise or privilege, that no man may set up a common ferry for all passengers without a prescription time out of mind, or a charter from the king." And he proceeds to make the claim that "every ferry ought to be under a public regulation, viz.: that it give attendance at due times, keep a boat in due order, and take but reasonable toll." So, also, in respect to wharves and wharfingers, the same writer says:—

"A man, for his own private advantage, may, in a port or town, set up a wharf or crane, and may take what rates he and his customers can agree for cranage, wharfage, housellage, pesage; for he doth no more than is lawful for any man to do, viz., make the most of his own. * * * If the king or subject have a public wharf, *unto which all persons that come to that port must come* and unlade *or* lade their goods, as for the purpose, because they are the only wharves licensed by the king, * * * or because there is no other wharf in that port, as it may fall out where a port is newly erected; in that case there cannot be taken arbitrary and excessive duties for cranage, wharfage, pesage, etc., neither can they be enhanced to an immoderate rate; but the duties must be reasonable and moderate, though settled by the king's license or charter. For now the wharf and crane and other conveniences are affected with a public interest, and they cease to be *juris privati* only; as if a man set out a street in new building on his own land, it is now no longer a bare private interest, but is affected by a public interest."[1] At common law, the right of property in a wharf or pier was a franchise. Lord Hale, therefore, cannot be cited in support of the doctrine that the State may regulate the prices charged in a business which from the circumstances becomes a virtual monopoly. And even if he did justify such regulations, his opinions can hardly be set up in opposition to the rational prohibibition of the American constitution. By all the known rules of constitutional construction the conclusion must be reached that the regulation of prices in such a case is unconstitutional; and while the common law is still authority for the propriety and justification of laws, which antedate the American constitutions, it cannot be cited to defeat the plain meaning of the constitution in respect to laws subsequently enacted.

[Back to Table of Contents]

§ 97.

Later Cases On Regulating Prices And Charges—Regulations Must Be Reasonable—What Is A Reasonable Regulation, A Judicial Question.—

The principle, enunciated in the case of Munn *v.* Illinois, by the Supreme Court of the United States, has been confirmed by a number of later cases, in the same court, and in other State courts.1

If the doctrine of Munn *v.* Illinois and of the Granger cases, relating to legislative regulation of railroad rates, had been left unlimited in its operation, the fear of Justice Field in his dissenting opinion2 that under the judgment of the court in that case "all property and all business are held at the mercy of a majority of its legislature," would have been more than realized. Yielding to the demands of popular sentiment, the legislatures and railroad commissions have in a number of cases placed the maximum charges for freight and passengers so low that it was impossible for the railroads affected thereby to conduct their business with any reasonable profit on the capital invested. To have permitted these regulations to stand as lawful exercises of the police power would have been a justification of the confiscation of property under the guise of a police regulation for the prevention of extortion. A virtual confiscation like that is clearly beyond the police power.1 The contention for reasonable regulations of rates and charges led to the enunciation by the courts of the rule that no such regulation would be constitutional, if it prevented the railroad or other business from earning a reasonable profit on the capital invested, and that whether such a regulation was unreasonable, and hence unconstitutional, was a judicial and not a legislative question. This litigation culminated in, and was finally settled, in accordance with the principle just stated, by the Nebraska freight rate decision of the Supreme Court of the United States.2

In this case the Supreme Court of the United States pronounced the Nebraska freight rate law to be unconstitutional, in that it established maximum rates which were so low, that the railroads affected thereby could not with any reasonable profit carry on the intrastate business, which alone fell within the operation of the State regulation.

In giving judgment for the court Mr. Justice Harlan said, *inter alia:*—

"Undoubtedly that question [just compensation] could be more easily determined by a commission composed of persons whose special skill, observation and experience qualifies them to so handle great problems of transportation as to do justice to the public as well as to those whose money has been used to construct and maintain highways for the convenience and benefit of the people. But despite the difficulties that confessedly attend the proper solution of such questions, the court cannot shrink from the duty to determine whether it be true, as alleged, that the Nebraska statute invades or destroys rights secured by the supreme law of the land. No one, we take it,

will contend that a State enactment is in harmony with that law simply because the legislature of the State has declared such to be the case; for that would make the State legislature the final judge of the validity of its enactment, although the Constitution of the United States and the laws made in pursuance thereof are the supreme law of the land, anything in the constitution or laws of any State to the contrary notwithstanding.

"The idea that any legislature, State or Federal, can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions. The duty rests upon all courts, Federal and State, when their jurisdiction is properly invoked, to see to it that no right should by the supreme law of the land be impaired or destroyed by legislation. * * *

"In our judgment, it must be held that the reasonableness or unreasonableness of rate prescribed by a State for the transportation of persons and property wholly within its limits must be determined without reference to the interstate business done by the carrier, or to the profits derived from it. The State cannot justify unreasonably low rate for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business. So far as rates of transportation are concerned, domestic business should not be made to bear the losses on interstate business nor the latter the losses on domestic business. It is only rates for the transportation of persons and property between points within the State, that the State can prescribe; and when it undertakes to prescribe rates not to be exceeded by the carrier, it must do so with reference exclusively to what is just and reasonable, as between the carrier and the public, in respect of domestic business. The argument that a railroad line is an entity; that its income goes into, and its expenses are provided out of, a common fund; and that its capitalization is on its entire line, within and without the State, can have no application where the State is without authority over rates on the entire line and can only deal with local rates, and make such regulations as are necessary to give just compensation on local business.

"If a railroad corporation has bonded its property for an amount that exceeds its fair value, or if its capitalization is largely fictitious, it may not impose upon the public the burden of such increased rates as may be required for the purpose of realizing profits upon such excessive valuation or fictitious capitalization; and the apparent value of the property and franchises used by the corporation, as represented by its stocks, bonds and obligations, is not alone to be considered when determining the rates that may be reasonably charged. What was said in Covington & Lexington Tpk. Road Co. *v.* Sandford, 164 U. S. 578, is pertinent to the question under consideration. It was there observed: 'It cannot be said that a corporation is entitled, as of right, and without reference to the interests of the public, to realize a given per cent. upon its capital stock, when the question arises whether the legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway, stockholders are not the only persons whose rights or interests are to be considered. The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreasonable and unjust to the company and its stockholders. But that involves an inquiry as to what is reasonable and just for the public. * * * The public cannot properly be subjected to unreasonable rates in order that stockholders

may earn dividends. The legislature has the authority, in every case, where its power has not been restrained by contract, to proceed upon the ground that the public may not rightfully be required to submit to unreasonable exactions for the use of a public highway established and maintained under legislative authority. * * * The utmost that any corporation, operating a public highway, can rightfully demand at the hands of the legislature, when exerting its general powers, is that it receives what, under all the circumstances, is such compensation for the use of its property as will be just, both to itself and to the public."

"We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stocks, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway then the services rendered by it are reasonably worth."

But in every case, in which the reasonableness of a police regulation of rates and charges is the ground for attacking its constitutionality, it would seem natural to hold that the burden is on the carrier, elevator company, or other person, who is affected by the regulation, to prove that the maximum rate is unreasonable. This would be only a special application of the general rule of constitutional interpretation and construction, that a court will hold to the presumption in favor of the constitutionality of a legislative act, unless it has been forced to declare it unconstitutional by the removal of every reasonable doubt. Certainly, it is not unconstitutional for the legislature to declare the establishment by the legislature of a maximum rate to be *prima facie* evidence of its reasonableness.1

But while reasonable regulations of rates and charges can be enforced against corporations in general notwithstanding the Dartmouth College Case,1 they cannot be made to apply to corporations, which are operating under charters, in which the rates of compensation for the services of the corporations to the public are expressly fixed. The stipulation in the charter of the rate of compensation constitutes a part of the contract between the State and corporation, which cannot be abridged or altered by subsequent legislation,2 unless the power to amend the charter is expressly reserved; and then the subsequent regulation of charges by such corporations must be valid, as an amendment of the charter.3

Individuals may also have rights, which may, on the other hand, interfere with the legislative authorization to a corporation to make charges for its services. This proposition was laid down as law, in a case, where the legislature authorized a

turnpike company to exact toll from the citizens of a town, who were exempted from paying toll by the charter of the company. The act, authorizing the collection of toll of these citizens, was held to be an unconstitutional interference with their vested rights.4

[Back to Table of Contents]

§ 98.

Police Regulation Of The Labor Contract.—

In no phase of human relations is there a more widespread manifestation of legislative determination to interfere with and to restrict the constitutional liberty of contract, than in the contract for labor between employer and employee. If the American declaration of the equality of all men before the law was a reality, and all that was necessary to insure substantial equality was to prevent the government from showing favors and granting privileges to one class to the exclusion of the others, there would be no need of any unusual interference with the liberty of contract between the employer and employee. For, since the employer and employee are equally guaranteed that liberty of contract, which is justly considered the badge of a freeman, each is absolutely free to make whatever contract he sees fit, and to refuse to concede to the terms of contract the other may propose. If the legal equality, which is declared to exist between employer and employee, was a reality, instead of a legal fiction, the laborer would not seek legislative interference in his contractual relations with the employer more actively than does the employer. He would felicitate himself upon the constitutional right to accept or reject the terms of employment which are proposed to him. But there can be no substantial equality between the man, who has not wherewith to provide himself with food and shelter for the current day, and one, whether you call him capitalist or employer, who is able to put the former into a position to earn his food and shelter. The employer occupies a vantage ground which enables him, in a majority of cases, to practically dictate the terms of employment. Liberty of contract, unrestricted, is to the laborer not always an unmixed blessing. He wants the liberty of contract restrained and limited, as to matters which are detrimental to his interests, and to which he must submit under the stress of circumstances, while he is left at liberty to make terms which will be favorable to him, and which he may obtain from the employer. Hence this large crop of legislative interference with the labor contract. But the constitutional guaranty of liberty of contract is intended to operate equally and impartially upon both employer and employee; and we find, therefore, that most of the attempts at legislative interference are pronounced unreasonable, and hence unconstitutional.

The disposition of the courts seems to be to pronounce any regulation of the labor contract unconstitutional which does not have for its object the preservation of the health and safety of the workman, or his protection against fraud, which is concealed and which is difficult for him to detect and guard against by his own unaided efforts.

[Back to Table of Contents]

§ 99.

Regulation Of Wages Of Workmen—Mode Of Measuring Payment—Compulsory Insurance And Membership In Benefit Societies—Release From Liability For Injuries To Employees.—

No attempt has been made in any of the United States to stipulate or regulate the minimum wage in any private employment, and to prohibit any contract which provides for the payment of a smaller amount. But statutory provisions have been made in a number of the States, either by State statute or municipal ordinance, for the regulation of the rate of wages to be paid by the State or city to their employees, skilled or unskilled. So far as these regulations are only stipulations of the rate of wage which the government will pay to those who are thus employed by government officials, and prohibit those officials from changing by express contract the rate of wage, there is no room for any constitutional question. In establishing such a regulation, the State or city is only exercising the ordinary common law power of a principal to direct its agent's action in making contracts in the name of the principal. But if the regulation goes farther, and declares, as many of them do, that the stipulated rate of wage of employees on government work shall not be lessened or increased by contract, whether the work is done under the supervision of government officials, and the wages paid to the workmen due it by the government; or such work is let to private contractors, who employ and pay the workmen; the liberty of contract of the contractor is unquestionably infringed by such a regulation. And were it not for the rulings of the courts in the elevator cases,[1] one would feel confident that the regulation would, so far as it applied to contractors for government work, be declared by the courts to be an unconstitutional interference with the liberty of contract.[2]

One would be likely to think that, if it was lawful for the State to regulate the rate of charges, which an elevator owner may charge for the storage of grain, because the elevator, on account of the necessities of the shipper, was a virtual monopoly; it would be equally lawful for the State to regulate the rate of all wages, by establishing a minimum rate of wages, because work is necessary to the life of the workman and his family, and the possession of capital makes the capitalist or employer a virtual monopolist.

While the rate of wage of private employees is universally left to be settled by the terms of the contract made by the individual employer and employee, numerous enactments have been made in the different States, which are designed to control the rate of wage in a collateral way.

A good illustration is that of the regulation, which is found in many of the mining States, of the mode of ascertaining the wages of the miners, who are, according to the terms of the contract, to be paid a sum measured by the amount of coal which they

mine per day or per week. Some of these regulations require only that the coal be weighed, in order to determine the exact wages due to the miner; while others require that the coal should also be weighed before it is screened, and prohibiting the enforcement of the miner's contract to be paid by weight for the amount of screened coal which he has weighed. Both regulations have been held by some of the courts to be an unconstitutional interference with the liberty of contract.1 In these cases, not only were the regulations held to be unconstitutional, because they constituted an unlawful interference with the liberty of contract; but also because it was a special law, affecting only one class of people, and not applicable to workmen in general. If the Illinois court is correct in calling such an act a special law, which is inhibited by the general constitutional provision against the enactment of special laws, no attempt at regulating the contractual relations of employer and employee would be successful in evading constitutional objection; for the reason that the same regulation cannot be made to apply alike to all employments; the conditions and interests of employees varying indefinitely with the nature of the employment. But there cannot be much doubt that the Illinois court is not in harmony with the general trend of judicial opinion, in the construction and scope of the constitutional provision against the enactment of special laws. A law is not special which includes within its operations all persons of a class, to which its provisions can alone be applied. If that were the true construction of this clause of the constitutions, most of the police regulations of trades and businesses, as well as of property, would be unconstitutional as class legislation.1

If these laws, regulating the ascertainment of miners' wages, are unconstitutional; they are so, because they, as general laws, are an unconstitutional interference with the liberty of contract of the individual employer or employee. But judicial opinion is not unanimous as to the unconstitutionality of these laws. In a West Virginia case, a law, which required coal to be weighed before it was screened, in order to determine the wages of the miner, was sustained; and it was held that it did not violate the constitutional guaranty of "enjoyment of life and liberty, with the means of acquiring and possessing property, and of pursuing and obtaining happiness and safety."2

In England and to a considerable degree in the United States, the large railroad corporations have instituted, under their supervision, charitable and relief associations among their employees; the associations being supported, and the relief to the individual employee, in case of sickness, injury from accident or death, afforded, by the contributions of the employees out of their wages. So far as the employee is left free, on entering into the employ of the railroad, to enter into such associations or to remain aloof, there is no room or excuse for legislative interference. But the beneficent effects, to the railroads as well as to the employee, are so apparent, when the relief associations are successfully managed and are generally patronized by the employees, that many of the railroads make membership in their relief associations a condition precedent to the contract of employment, and refuse to employ those who will not subscribe to the agreement. They also reserve the right to pay the dues of the employee out of his wages. This would seem to be a very reasonable provision for the welfare of the employee, as long as the relief association was honestly and successfully managed, which could give rise to no hostility on the part of the labor organizations; if one does not realize that it has the collateral effect of discouraging

strikes for higher wages and better terms of employment, and encouraging a more faithful performance of duties, so as to avoid the forfeiture of their rights as a member of the relief association. For these collateral reasons, the labor organizations have procured the enactment in some of the States of laws, which prohibit any employer of labor from making contribution by the employee to any charitable or relief association, a condition of the contract of hiring. It would seem to be of very little doubt, in the present condition of judicial opinion, that these laws would be declared to be unconstitutional, as an unreasonable interference with the individual liberty of contract. Some of the regulations of the railroads, in connection with their requirement of membership by all their employees in these relief associations, would not escape constitutional objection. Thus, for example, the stipulation, which is sometimes exacted of the railroad employee on joining the relief association, that he will not sue the railroad company for injuries which he may have sustained in the course of his employment. This stipulation is illegal, on the general principle, that a contract is against public policy, which constitutes a waiver in advance of all claims for damages which result from the negligence of another.1 But it has been held to be lawful to stipulate that the receipt of the benefits from the relief association for such injuries shall constitute a release of the company for liability for negligence, where the benefits are a substantial equivalent of the claim against the company.2 The courts, however, have held that the whole subject is regulative by positive statute; and that a statute is constitutional, which declares void any stipulation of the contract of hiring, which in any way restricts the liability of employers for injuries sustained by the employee.3

This provision for compulsory membership in railroad relief associations is somewhat like the provision for compulsory insurance, which is to be found in the laws of the German Empire, whereby the employer is required to provide, as a part of the compensation of the laborer, a certain amount of accident and life insurance.

[Back to Table of Contents]

§ 100.

Regulation Of Wages Of Workmen, Continued—Time Of Payment—Medium Of Payment—Fines And Deductions For Imperfect Work—Mechanics' Lien And Exemption Of Wages.—

Another very common regulation of wages is the statutory requirement, that the wages shall be paid to certain enumerated classes of workmen at stated periods, in some cases weekly, in others bimonthly. The object of such legislation is to protect the workman against the injustice of being compelled to wait an undue time for his wages. Some of these regulations are limited to corporation employers, while others apply to natural persons as well as to corporations, who are engaged in the businesses, which are intended to be brought within the operation of the act. In all of them, except the statute of Wisconsin, any agreement for some other period of payment is declared to be illegal. While these acts are professed to be for the protection of the workman; and, probably, in ordinary times of prosperity and activity of business, it is a beneficial regulation, however doubtful the necessity for the regulation may seem to most minds; it is likewise true they may in times of money stringency and slackness of business prove a source of the most serious injury and suffering to the workman. As it was explained by the court in a recent case:[1] "An illustration of the manner in which it affects the employee, out of the many that might be given, may be found in the conditions arising from the late unsettled financial affairs of the country. It is a matter of common knowledge that a large number of manufactories were shut down because of the stringency in the money market. Employers of labor were unable to continue production for the reason that no sale could be found for the product. It was suggested in the interest of the employers, as well as in the public interest, that employees consent to accept only so much of their wages as was actually necessary to their sustenance, reserving payment of the balance until business should revive, and thus enable the factories or workshops to be open and operated with less present expenditures of money. Public economists and leaders in the interest of labor suggested and advised this course. In this State, and under this law, no such contract could be made. The employee who sought to work for one of the corporations enumerated in the act would find himself incapable of contracting as all other laborers might do. * * * The employee would, therefore, be restricted from making such a contract as would insure to him support during the unsettled condition of affairs, and the residue of his wages when the product of his labor could be sold. They would, by the act, be practically under guardianship; their acts voidable, as if they were minors; their right to freely contract for and to receive the benefit of their labor as others might do, denied them."

The decisions of the courts as to the constitutionality of these regulations of the periods of payment of wages are more or less conflicting. In two cases they are declared to be constitutional, whether they applied to corporations or to natural

persons.1 In other cases, the regulations were held to be constitutional, so far as they undertook to control the payment of wages to employees of corporations, but unconstitutional, so far as they applied to the employees of natural persons;2 while in a number of cases, the regulation is declared to be altogether unconstitutional, in that it was an unlawful interference with the individual liberty of contract.3

If the protection of the ignorant and unsuspecting against the fraud and oppression of another is ever a justification for the police regulation of the liberty of contract, it is surely justifiable, when it takes the form of legislation, which, following in the main the provisions of the English Anti-truck law, have prohibited certain classes of employers, especially manufacturers and persons and corporations who are engaged in mining, from paying their employees in orders or drafts, which are redeemable only in goods bought at the stores of the employers. This legislation is designed to prevent fraud and oppression in charging exorbitant prices for the goods, which under the order system the employee is obliged to buy of the employer. These acts generally prohibit the payment of wages in anything but lawful money; or if the orders are permitted at all, they are required to be redeemable in whole or in part in lawful money, at the option of the employee. In some States, the statutes prohibit the employers, who are included within the operation of the act, from keeping stores in conjunction with their main business for the supply of goods to the employees.

A distinction is very properly made between an act, which prohibits an employer from keeping a truck store for the use and convenience of his employees, and one which prohibits an employer from compelling an employee to buy from the stores of the employer, by paying his wages in orders, which are redeemable only in goods bought at the store. If the wages of the employee are paid in lawful money, and he has not obligated himself to purchase any of his supplies from the employer's truck store, his personal liberty is in nowise endangered by the maintenance of a truck store, adjacent to the factory or works; and the store may prove a positive benefit to him, in making it unnecessary for him to go a long distance to purchase what he and his family may need. In testing the constitutionality of these statutes, and distinguishing between them, by a consideration of their relative degrees of reasonableness or unreasonableness, as a regulation for the prevention of the practice of fraud and oppression upon the ignorant and helpless; it is justifiable to pronounce the law unconstitutional, which prohibits an employer from keeping a truck store for the service of the employees;1 while the law is declared to be constitutional which prohibits an employer from compelling his employees to deal at his store, by paying their wages in anything but lawful money. Unless the position of the text of preceding sections is adhered to, that, under the doctrine of political equality of all men, and the inviolability of the individual liberty of contract, the possibility that the man of superior intelligence and skill will take undue advantage of the weaker vessel, with whom he is contracting, is no justification for the police regulation of the liberty of contract; then there can be no ground, upon which these statutes can consistently be declared unconstitutional, except that they may be class legislation (as to which, see later); and that objection only can obtain, when the legislation is made to include only particular classes of persons and corporations. If the legislation is universal in its application to all employees, the legislation ought undoubtedly to be declared a

constitutional exercise of police power. And such has been the conclusion of a number of the cases.1

It is to be observed that in almost all of the cases, in which these so-called anti-truck laws have been held to be unconstitutional, the position of the courts has been made to rest upon the principle, that they were violations of the constitutional prohibition of class legislation, in that they applied to only a class of persons; making that unlawful, when done by that class of persons, which is perfectly lawful when done by others. In these cases, the statute generally applied to persons who were engaged in manufacturing and mining, and did not include those persons and corporations who were engaged in other trades and businesses, in which they might be paying their employees in orders on their truck-stores.2

In Pennsylvania, although the act applied only to persons and corporations, who were engaged in mining of any kind or manufacturing, the Supreme Court pronounced the act to be unconstitutional, on the general ground that it was an unlawful restriction of the individual liberty of contract, pronouncing the legislation to be "an attempt by the legislature to do what, in this country, cannot be done; that is, prevent persons who are *sui juris* from making their own contracts."1

One of the most unreasonable and most unjust attempts, to enhance the interests of the average workman at the expense of the employer, is to be found in legislation in a few of the States, which prohibits an employer from imposing fines on the employee, and making deductions from his wages, on account of imperfect or careless work done, or of injury to machinery. In the absence of a statute, it has been held to be a clear right for an employer to impose such fines, and to make such deductions, where provision is made for them in the contract of hiring.1 Where the act, prohibiting such fines and deductions, relates only to one or more kinds of employment, and is not applicable to others, it would seem to be unconstitutional as class legislation. And so, on the other hand, as in the Ohio statute, where the prohibition only applies to the case, where there has been no express provision for such fines and deductions in the contract of hiring, there can be no constitutional objection to the statute. But if the law should be made to apply to all kinds of trades and businesses, and should deny the validity of any express stipulation in the contract of hiring of the right of the employer to impose such fines and deduct the same from the employee's wages; the conclusion, in the light of the general trend of judicial opinion, would seem to be undoubted, that the legislation was unconstitutional as an unlawful restriction of the individual liberty of contract. The leading cases on this subject are from Massachusetts, in which State the regulation was made to apply to all employers of weavers, and prohibited fines and deductions from wages for imperfections arising during the process of weaving. The court held the act or acts containing these regulations to be an unconstitutional restriction of the liberty of contract; but adding that "if the act went no further than to forbid the imposition of a fine by an employer for imperfect work, it might be sustained as within the legislative power conferred by the constitution of this commonwealth."2 In Arkansas a statute required all corporations and persons engaged in operating and constructing railroads and railroad bridges, and contractors and sub-contractors who are engaged in the construction of any railroad or railroad bridge, to pay the employees on the day of their discharge the unpaid wages still due

at contract rate, *without abatement or deduction.* It was held that the statute was constitutional so far as its provisions apply to corporations, and unconstitutional so far as they apply to natural persons, such as contractors and sub-contractors.1

A variety of provisions is to be found in the statute books of the different States, having for their object, on the one hand, the protection of the laborer against his own indiscretion in making debts beyond his capacity to pay, by exempting his wages and tools, as well as other enumerated property from attachment and execution for his debts; and, on the other hand, to secure to him the payment of his wages through all the financial vicissitudes of his employer, sometimes by giving him a claim for his wages of priority over all other creditors of the employer, and sometimes by giving him a lien on the property on which his labor has been expended. These regulations, varied as they are, contain no new principle of police regulation, and should not be considered as involving any serious constitutional question, beyond what might be raised in any other case of exemption or priority of lien over other creditors. The priority laws have been the subject of litigation in two cases; but in both they have been sustained as constitutional, so far, at least, as they affect the rights of creditors which have been acquired subsequent to the enactment of the laws, giving the priority to laborers.2

But in Pennsylvania, an act of the legislature was declared unconstitutional, because violative of the indefeasible right of acquiring, possessing and protecting property, which provided that the contractor for the erection of a building shall be deemed to be the owner's agent, and that no contract between them that no lien shall be filed on the property, shall prevent the claim of the subcontractor to a mechanic's lien on the building, unless the latter agrees in writing to be bound by the provisions and stipulations of the contract between the owner and the contractor.1 On the other hand, in Ohio, laws have been declared to be unconstitutional, which give to sub-contractors, laborers and material men, a lien on the property of the owner for wages and claims, which are owing to them by the contractor.2 The position of the Ohio court is not without soundness in that all such liens are imposed upon one man's property, in order to secure the performance of another man's contracts. Still, the fact that the owner is the ultimate beneficiary of the labor and materials which have been expended upon his property, the mechanics' lien law only throws upon the owner of the property the burden of seeing that the contractor pays his bills, and makes the owner of the property a trustee for the subcontractors, laborers and material men. But is it justifiable for the State to impose such a burden upon him?

[Back to Table of Contents]

§ 101.

Prohibition Of Employment Of Aliens—Exportation Of Laborers—Importation Of Alien Laborers Under Contract—Chinese Labor—Employers Compelling Workmen To Leave Unions.—

The labor unions strenuously oppose the increase in competition of labor by the importation of labor into the State. And they endeavor by private agreements with employers to prevent such importations. But in a few cases they have attempted to secure such protection by legislation, both State and Federal. No attempt has been made by State legislation to restrain importations of laborers from another of the United States; for the constitution expressly prohibits such legislation, in guaranteeing that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."1 The States, however, have by legislation undertaken to protect native labor against alien labor. But in each case, the legislation has been declared to be an invasion of the jurisdiction of the United States government and an unconstitutional interference with the rights of resident aliens.2

But Congress has passed an act which prohibits the importation into this country from foreign lands of aliens under contract to perform labor in this country. So long as protective tariffs, which interfere with the citizen's liberty of contract in the purchase and importation of foreign goods, are maintained as constitutional,1 it is but natural and just that the courts should sustain this act of Congress, which is properly described as a protective tariff against foreign labor, which has assumed the absolutely prohibitive form. Such has been the decision of the courts.2

It was held in California, that a city ordinance was unconstitutional, which made it a misdemeanor for a contractor, engaged in work for the city, to employ Chinese laborers.3

A curious case of an attempt to prohibit, by the imposition of a heavy license fee ($1,000) on the agent, the exportation of laborers from the State, comes from North Carolina. The statute was held to be unconstitutional; not, however, on the ground that it interfered with any provision of the United States constitution, but because the amount of the license fee made it a prohibitive or destructive police regulation, which was not justified by the innocent and harmless character of the business.4

On the other hand, in consequence of the exactions of labor unions, often unjust and tyrannous, employers have frequently stipulated in the contract of hiring that the employee shall not be a member of any labor union; and that if he is a member at the time of hiring, he must sever his connection therewith, as a condition precedent to his employment. It would seem that the right to make such a stipulation was a fundamental part of the guaranteed liberty of contract; and that a State statute, which

made it unlawful for an employer to refuse to employ union men, or to compel an employee to withdraw from a trade union on pain of dismissal, would be clearly unconstitutional. And that has been the decision of the Missouri Supreme Court.1 But an Ohio court has sustained such a law.2

[Back to Table of Contents]

§ 102.

Regulating Hours Of Labor.—

The leaders of labor organizations have endeavored to secure better terms of employment by the enactment of laws, regulating the hours of labor. And the same constitutional questions arise in the consideration of these regulations as to hours of labor, as have arisen in connection with the statutory regulation of wages, and other terms of the contract of hiring. The same principles of constitutional law must determine their constitutionality. In almost every State there are regulations of this kind, varying in their scope, both as to persons and occupations, and it is believed that in no State has any law been passed which prohibits employees generally from working any one day beyond the statutory number of hours. Such a bill was proposed by the Legislature of Colorado; but it was before enactment declared to be unconstitutional by the Supreme Court, on the ground that it was in violation of the constitutional liberty of contract.3 In every other case of regulation of the hours of labor in private employment, the statute does not prohibit work for more than the statutory time, but requires, in case of being required to work longer, that extra compensation be paid; and in some cases, that the wages for the overtime be at a higher rate. So far as the legislature undertakes to say what shall be considered a day's work, in the absence of an express or implied contract, there is no more interference with the liberty of contract, than where statutes provide what rates of interest shall be paid on notes and other monetary obligations, in the absence of an express agreement. But where the statute declares what hours of labor shall constitute a day's work, and makes it obligatory that extra compensation shall be paid for overtime, whether it be the same or an increased rate of wage; the constitutional objection to the legislation, as being an infringement of the individual liberty of contract, is just as strong, as where the right to work for more than the prescribed time is denied altogether. Both employer and employee are prohibited from contracting for a longer day's work for the current rate of wages.1

In those States, in which the statutes simply prescribe what shall constitute a day's work, in the absence of an agreement otherwise, it is undoubtedly the right of the employee to demand extra wages for the overtime work, unless there has been an express or implied contract between the parties for a longer day's work.2 But where the established custom in the particular trade or occupation is to work for a longer time per day than the statutory period, the employee is presumed to know of such usage and custom, and he cannot demand extra compensation for the overtime, in the absence of an express contract for the same.3 Some of the cases, however, hold in construing these statutes that no extra compensation can be demanded for overtime work, unless it has been stipulated for in the contract of hiring.4

Regulations of the hours of labor for women and children do not rest on the same principles altogether; and they are found in every State. In most cases, the regulations refer to work in factories and workshops. The same object is held in view in these

regulations, as in regulations of hours of adult male labor, viz.: to prevent oppression by requiring excessive hours of labor, to the moral and physical injury of the laborer. But in regulations of this kind, relating to adult male labor, we are confronted by the constitutional declaration of the equality of all men, and the inalienable liberty of contract. It does seem very absurd, from the stand-point of individualism, which is the fundamental principle of the American public polity, and of which universal male suffrage is the public exponent, to enact laws to prohibit a man from contracting for more than a prescribed day's work, and at the same time declare him to be the political equal of the employer. But children and women are not placed in this political dilemma. The right of participation in the government is denied to both; and, except so far as modern statutes have changed the common law in regard to married women, both have had their right to contract more or less restricted. The constitutional guaranty of the liberty of contract does not, therefore, necessarily cover their cases, and prevent such legislation for their protection. So far as such regulations control and limit the powers of minors to contract for labor, there has never been, and never can be any question as to their constitutionality.1 Minors are the wards of the nation, and even the control of them by parents is subject to the unlimited supervisory control of the State.2

The position of women is different. While women, married and single, have always been under restrictions as to the kinds of employment in which they might engage, and are still generally denied any voice in the government of the country, single women have always had an unrestricted liberty of contract, and the contractual power of married women was taken away from them on the ground of public policy, in order to unify the material interests as well as the personal relations of husband and wife. With the gradual breaking-down of these restrictions upon the right of married women to contract, there seems to be no escape from the conclusion that the constitutional guaranty of the liberty of contract applies to women, married or single, as well as to men. We are, therefore, not to be surprised to find the courts at variance, in deciding upon the constitutionality of laws, regulating the hours of labor for women. The Supreme Court of Massachusetts has held such laws to be constitutional, on the ground that women are still more or less under the tutelage of the State, and need the same protection of the State against the oppression of the employer, as do minors.1 On the other hand, the Supreme Court of Illinois holds such regulations to be an unconstitutional interference with the woman's liberty of contract.2

While it would seem to be the settled judicial opinion that it is unconstitutional for the legislature to regulate the hours of labor by taking away all liberty of contract in the matter, where the object is merely the protection of the employee against the exaction of a disproportionate amount of work for the wages paid; the courts are disposed to hold otherwise, where the statutory regulation is intended to protect the safety of the public, or the health of the individual employee, from the dangers threatened by the excessive and exhaustive labor of the workman. Thus, in New York it has been held to be lawful, in the interest of the public, if not in that of the workman, for the legislature to prohibit railroads from permitting or requiring trainmen, who have worked twenty-four hours, to go on duty again until they have had eight hours rest. The same act also provided that ten hours work out of twelve consecutive hours shall be a day's work, and that extra compensation shall be paid for the work done in

excess of that prescribed time. The act was held to be constitutional; and the sections prescribing what shall be a day's work, it was held, did not prohibit any additional work during the twenty-four hours.1 So, also, the Utah statute, which limited the hours of labor in all underground mines and smelting works, except in cases of emergency when life and property were in imminent danger, to eight hours per day, was held to be constitutional by the Utah courts, as well as by the Supreme Court of the United States; the latter taking the position that the State had a right to limit the hours of labor in all unwholesome employments.2

But if the danger to the health of the workman is a constitutional justification for such an interference with individual liberty of contract, in the case of particularly unwholesome employments; the same reason could be appealed to, only in a less degree, to justify the regulations of the hours of labor in all employments. For there is no other cause, equally common and general, of impaired health, broken-down constitutions and shortened lives, than excessive, and hence exhausting labor; it matters not whether the occupation is wholesome or unwholesome. The same collision between fact and theory, as to the legal equality of all men, again blocks the way to a rational regulation of the unequal relations of employer and employee.

Another common form of statutory regulation of the hours of labor, is the provision that workmen on public works shall not be required to work more than the prescribed number of hours per day. Where the regulation is applied to the employees of the city, county or State government, who are employed and paid directly by these respective governments, the constitutionality of the regulation can not be questioned; for the reason that these respective governments, in enforcing such a regulation, are only exercising the general right of a party to a contract to insist on a certain provision in the contract of hiring. And it would seem also to be rational to uphold the regulation as a constitutional exercise of authority, when it is applied to those laborers who are engaged on public works in the employ of contractors to whom the work has been let on contract, if the contract has been let after the enactment of the regulation. The requirement as to the hours of labor is properly considered as entering into and becoming a part of the contract between the government and the contractor. And this has been the conclusion of the New York Supreme Court in one case.1 In California and Ohio, a similar statute was held to be unconstitutional, as interfering with the liberty of contract.2 The United States courts have held a similar Federal regulation to be directory only, and not compulsory.3

[Back to Table of Contents]

§ 103.

Regulations Of Factories, Mines And Workshops—Sweatshops.[1] —

The safety and health of a large body of workmen, gathered together in one place, a mine, factory or workshop, are peculiarly endangered, if proper precautions are not taken by the employer against the sources of danger. And, everywhere, we find statutes, both varied and numerous, which require employers and the owners of buildings which are used as workshops, and the owners of mines, to do certain things, which are declared by statute to be necessary for the protection of the workman. Inspectors are generally appointed to see that the statutory regulations are observed. These regulations in the main are all reasonable safeguards, and their constitutionality has been rarely questioned.[2] An enumeration and explanation of them is for that reason not necessary in this place. Some of these regulations are, however, in direct opposition to the old common law theory of the nonliability of the employer for injuries sustained by the employee, either through accident or the carelessness or negligence of the fellow-servant. And, so far as a regulation does have the effect of changing these rules of law, an opportunity for questioning its constitutionality might arise. Thus, the constitution of Mississippi provides that "knowledge by an employee injured of the defective or unsafe character or condition of any machinery, ways, or appliances shall be no defense to an action for injury caused thereby."[3] A Pennsylvania statute required owners of coal mines to employ a foreman, who shall be certified by a State official to be competent, whose duty shall be, on every alternate day, to examine every working place in the mine and direct it to be properly secured, and to permit no one to work in an unsafe place except to put it into a safe condition. The act was held to be unconstitutional in that it made the employer liable for injuries which had been caused by the wrongful act of a fellow-servant.[1]

[Back to Table of Contents]

§ 104.

Period Of Hiring—Breach Or Termination Of Labor Contract—Compulsory Performance Of Labor Contract—Requirement Of Notice Of Discharge—Employers Required To Give Statement Of Reasons For Discharge.—

In the vast majority of employments, the labor contract does not contain any stipulation of a definite term of service. The contract is an indeterminate one as to the period of service, each party reserving the right to terminate the same at will and at any time. There may, however, be an express agreement as to length of employment in the ordinary labor contract, as in any other contract for the services of one of the parties thereto. It is probably true that a contract, by which one agrees to render certain services to another during his entire life, might be declared void as being tantamount to slavery or servitude, which is declared to be unlawful by the Thirteenth Amendment of the Constitution of the United States.2 But there can be no constitutional objection to a labor contract, which obligates the laborer to render certain services during a period of one, two, three, five, ten years, or any other definite period of time. And the California statute, which prohibits the enforcement of a labor contract, other than a contract of apprenticeship, beyond the term of two years from the commencement of service under it, may very reasonably be held to be unconstitutional, in that it restricts the constitutional right of the employee to make his own contracts.1

It goes without saying that there can be no compulsory service, where there has been no contract of service whatever.2 And since the ordinary labor contract provides for an indeterminate service, either party may terminate the contractual relation at his will, unless there are statutory regulations of that right, which constitutionally restrain him. But in the absence of statutory regulations, there is ordinarily no implication of law of a determinate term of service from the fact that the labor contract provides for the payment of wages at stated periods. This is the explanation of the supposed discrimination against employers, in the refusal of the courts to exercise their equity powers in compelling an employee to remain in the service of the employer, and to do his duty under the labor contract. The term of service, being indeterminate, it may be terminated at any time at the will of either party, and the employee cannot be compelled by injunction to remain in service, after he has decided to leave, and he exercises his right to terminate the relation of master and servant, in accordance with existing provisions of law or the terms of the labor contract, which may prescribe the method of terminating the relation.3 But the obligation to render services for a stated period of time need not be an express one. It may be implied from the nature of the employment. Thus, it has been a very general rule, probably throughout the civilized world, that a sailor, who has signed a shipping contract, may be compelled to specifically perform his contract of service. And that his arrest, imprisonment, and return on board of ship may be resorted to, in order to compel him to perform his

contract.1 And the statutes in the different States in the South, which make it a misdemeanor for a farm laborer to fail to perform his duties, and desert during harvest time, may be sustained on the ground, that the farm laborer, when he enters into service to harvest a crop, impliedly enters into service for the time necessary to complete the harvesting; and his desertion without cause of his employment before the conclusion of his term of service may be prevented by any legal remedy which the legislature may deem fit and appropriate. In Arkansas, South Carolina and Tennessee, the statute is general in its application to all kinds of laborers, although it is aimed at farm laborers in particular. In South Carolina, the statute provides that a laborer, who willfully and without just cause fails to give the labor reasonably required of him by the terms of his contract, or in other respects shall refuse to comply with the conditions of his contract, shall be liable to fine and imprisonment. The statute was held to be constitutional, and not repugnant to the constitutional prohibitions of involuntary servitude, or imprisonment for debt.1 A recent English statute makes it a penal offense for a workman in certain occupations to violate his labor contract by refusal to work, and provides a summary remedy for enforcing the performance of the contract.2

In the absence of statutory regulation, either party to an indefinite contract of service may terminate such contract, and therewith the existing relation of master and servant without any previous notice to the other party, unless the contract contains an express stipulation that such notice shall be given; or, perhaps, unless the giving of such a notice is an established usage in that particular occupation. In order to protect themselves against sudden and unexpected strikes, the employers are generally requiring such an agreement of their employees. And there can be no doubt that such an agreement can be enforced, and the stipulated penalty exacted.1 Statutes have been passed in some of the States regulating this matter of giving notice in a variety of ways. In most of the States, where such regulations obtain, it is provided that wherever an employee is required by the terms of his contract to give a certain notice to his employer of his intention to terminate his contract of service, the employer is required to give a similar notice of his intention to discharge the employee. There would seem to be no serious doubt of the constitutionality of such laws. In Louisiana, steamboat employees are required by statute to give notice of their intention to leave; while in Texas a statute requires railroads to give their employees thirty days' notice of their intention to reduce wages. There can be little doubt that statutes requiring notice are constitutional, if they are made mutually binding upon the employer and employee; but it may be doubtful whether the Texas statute would be sustained.2 On the other hand, in Connecticut it is made a penal offense to withhold any part of the wages of a workman who leaves his position without giving the contract notice. While in Arkansas a law has been sustained, which requires railroad corporations to pay discharged employees their wages in full on the day of discharge, subject to the penalty of double wages for each day thereafter on which they fail to make full payment of the wages due.1

In some of the States—Massachusetts and Georgia—statutes have been enacted, which require certain employers, railroad, express and telegraph companies, to furnish a discharged employee, when he demands it, a written statement of the cause of his discharge. Where the labor contract provides for a specific term of hiring, this

regulation might be held to furnish the laborer only with a reasonable assistance in proving that his discharge, before the expiration of the term of hiring, was without good cause, and was consequently a breach of the contract. But where the hiring was under an indefinite contract, the employer has the right to dismiss an employee at any time, with or without good reason therefor; and the regulation would seem to serve no other purpose than to furnish the trade union, of which the discharged employee is a member, with the means of intimidating the employer by threatening to take up the cause of the employee. The statute, in such cases, would be reasonable, only upon the principle, that an employer, under an indefinite labor contract, had not the right to arbitrarily discharge an employee. In passing upon the constitutionality of the Georgia statute it been held by the Supreme Court of that State that unregulated silence is as much of a constitutional right as liberty of speech and the freedom of the press. And a law, which compels one, against his will, to speak or write to another, is as much of an infringement of constitutional liberty, as a law which restrained one's liberty of speaking or writing, when he chose to do so, unless the disclosure was required in the interest of the public. And the public interest is not promoted by a compulsory disclosure of the reasons for the discharge of an employee. For these reasons, the statute was held to be unconstitutional.[1]

[Back to Table of Contents]

§ 105.

Regulations Of The Business Of Insurance.—

The business of insurance, both fire and life, is the occasion of a most extensive and far-reaching regulation by statute; and the general reason for the extensive regulation of this business is the necessity therefor to prevent fraud, misrepresentation and sharp practice on the part of the insurance company, and to protect the insured against his own negligence in not reading the terms of the contract of his insurance. The regulations, which have for their purpose the inspection and supervision of the affairs and business of the insurance companies, in order to insure the honesty and solvency of the companies who are doing business in the State, and to prevent companies from doing business which cannot show a clear bill of financial health; the requirement of a deposit of funds with the State officer as a security for the payment of death and fire loss, as well as other claims which might arise on the policies against the companies;—all regulations of these kinds are reasonable regulations for the prevention of fraud in the insurance business, similar to the general regulations of the banking business. In both businesses, on account of their nature, the individual is obliged to repose unquestioning confidence in the company, and has no convenient means of satisfying himself as to its financial soundness. Such regulations are undoubtedly constitutional.

But, recently, the regulations of the business of insurance have been greatly extended; and State laws now undertake to prescribe what kind of a contract of insurance the insured can agree to make. In some of the States; notably, Michigan, Minnesota, North Dakota, and Pennsylvania, official forms of policies are provided by statutes, which are required to be employed in making all contracts of fire insurance. In Wisconsin, a statute authorizes the insurance commissioner to adopt a printed form of policy for fire insurance, limiting his power by the requirement that the policy he prescribes shall be as near as possible to the form which had been adopted in another State. This statute was held to be unconstitutional, because it was a delegation of legislative power to the insurance commissioner.1 In some of the States it is also provided that the amount written in the policy shall be the amount recoverable in case of loss, and that the stipulation of the policy, that the actual value of the property at the time of loss shall be the measure of damages, shall be void and of none effect. The statute has been sustained as a reasonable regulation on the ground of public policy.2 In Missouri, the statute prohibits an insurance company, in a suit for the recovery of the face value of a fire insurance policy, from denying that the property insured was worth, at the time that the policy was issued, the full amount for which it was insured. The Supreme Court of Missouri sustained the constitutionality of this statutory interference with the right of private contract in its application to all new policies, and to old policies, which have been renewed subsequently to the enactment of the law.3

Similar regulations by statute of the contracts of life insurance obtain in many of the States. Thus, it is common for warranties in life insurance contracts to be declared by

statute to have only the effect of representations; and it was held to be doubtful whether the parties could, in the face of the statute, waive its operation by an express agreement that his representations shall have the effect of warranties.1 In New Jersey, a statute provides that all contracts of insurance, written in that State, shall be governed by the laws of that State.2 In Massachusetts, a copy of the signed application must be attached to the policy, in order that the original may be put in evidence in any suit on the policy.3 The most common statutory provision, relative to life insurance, is that which limits the grounds upon which a policy may be forfeited, and the extent of such forfeiture.

It was held by the United States Supreme Court, that the parties cannot by express contract waive the operation of the statute, which is mandatory; and that its provisions constitute a part of every contract of insurance which is written in the State, whether the insured wants it incorporated or not.4

In order to insure the fair and equal treatment of all policy-holders, a Pennsylvania statute prohibits any discrimination in favor of any individual in the gradation of rates of premium of the same class and of the same expectations of life, and makes any such arbitrary discrimination a misdemeanor. The statute has been declared to be constitutional. Nor can it be fairly characterized as unreasonable, or as a wrongful interference with the liberty of private contract, when it is borne in mind that the insurer is a corporation, enjoying extraordinary privileges as a gift from the State.1

But there are limitations to the power of the State to regulate insurance contracts, and the business of insurance. One limitation is that of the equitable prohibition of penalties and forfeitures. A Texas statute provided that whenever an insurance company of life or health failed to pay a loss, which has occurred on the policy, within the time after notice stipulated in the policy; the company shall pay to the holder, in addition to the loss, twelve per centum of such loss, together with all reasonable attorney's fees which have been incurred in the prosecution and collection of the claim. The statute was held by the Texas Court of Civil Appeals to be unconstitutional. The requirement of the twelve per cent. penalty was doubtless the chief occasion for the adverse decision of the court.2

The most surprising regulation of the business of insurance is to be found in the New York statute, which makes it a crime for an insurance agent to allow, as an inducement to contract for insurance, to the insured a rebate on the first premium of a policy of life insurance. In the Pennsylvania statute, which is referred to above, the prohibition of discrimination against or in favor of individuals is directed against the insurance company and controls the terms of contract of insurance. In the present case, the statute prohibits the agent to pay, practically out of his own pocket, a part of the first premium, which redounds to the benefit of the insured, in the form of a rebate. This statute was held to be constitutional, as it is only a part of the extensive regulation of life insurance for the protection of policy holders.3

It is probably safe to say that the judicial indorsement of the constitutionality of these statutory regulations of the business of insurance was largely influenced by the fact that insurance companies are in most of the States foreign corporations, who are

obliged to submit to any regulations of their business, which the legislature of a State may in its discretion see fit to impose, as an absolute condition precedent to their doing business at all. Foreign corporations are not citizens, in the constitutional sense, who are guaranteed by the national constitution equal privileges and immunities in all of the States.1

[Back to Table of Contents]

§ 106.

Usury And Interest Laws.—

It has long been the custom in England and in this country to regulate the rate of interest.

The regulation of interest may be of two kinds. So far as the legislature undertakes to determine what rate of interest can be recovered on contracts for the payment of money, in the absence of the express stipulation of the parties, it is a reasonable police regulation, the object of which is to aid the parties in effecting settlements, when they have not previously agreed upon any rate of interest. If the parties are not satisfied with the statutory rate, they can agree upon any other rate. But it is different when the legislature undertakes to prescribe what rate of interest the parties to a contract may agree upon. The rate of interest, like the price of merchandise, is determined ordinarily by the relation of supply and demand. Free trade in money is as much a right as free trade in merchandise. If the owner of the property in general has a natural right to ask whatever price he can get for his goods, the owner of money may exact whatever rate of interest the borrower may be willing to give. For interest is nothing more than the price asked for the use of money. No public reason can be urged for imposing this restriction upon the money lender, and the utter futility of such laws, in attempting to control the rate of interest, is, or should be, a convincing proof of their unreasonableness. It has been suggested that originally these laws were based upon the fact that the lending of money was a special privilege. "The practice of regulating by legislation the interest receivable for the use of money, when considered with reference to its origin, is only the assertion of a right of the government to control the extent to which a privilege granted by it may be exercised and enjoyed. By the ancient common law it was unlawful to take any money for the use of money; all who did so were called usurers, a term of great reproach, and were exposed to the censure of the church, and if, after the death of a person, it was discovered that he had been a usurer while living, his chattels were forfeited to the king, and his land escheated to the lord of the fee. No action could be maintained on any promise to pay for the use of money, because of the unlawfulness of the contract. Whilst the common law thus condemned all usury, Parliament interfered, and made it lawful to take a limited amount of interest. It was not upon the theory that the legislature could arbitrarily fix the compensation which one could receive for the use of property, which, by the general law, was the subject of hire for compensation, that Parliament acted, but in order to confer a privilege which the common law denied. The reasons which led to this legislation originally have long since ceased to exist; and if the legislation is still persisted in, it is because a long acquiescence in the exercise of a power, especially when it was rightfully assumed in the first instance, is generally received as sufficient evidence of its continued lawfulness."[1]

But, of course, this reason furnishes no justification for the present existence of such laws. In the light of modern public opinion, the lending of money on interest is in no

sense a privilege, and no law can make it so. The biblical injunction against the taking of interest, and the fact that the original money lenders of Europe were Jews; in other words, respect for the teachings of the Bible on the subject, and hate for the despised Jew, probably combined to bring the usury laws into being. In the Middle Ages, the Jew had no rights at all. Every recognition of his natural rights was a privilege. Suffice it to say, that on no satisfactory grounds can usury laws be justified. But their enactment has so long been recognized as a constitutional exercise of legislative authority, and the fact that they become dead letters as soon as enacted, render it very unlikely that the courts will pronounce them unconstitutional, however questionable legal writers and authorities may consider them. Mr. Cooley says that the usury laws are "difficult to defend on principle; but the power to regulate the rate of interest has been employed from the earliest days, and has been too long acquiesced in to be questioned now."1 I differ with the learned judge in his opinion that long acquiescence in such laws precludes an inquiry into their constitutionality; but will readily accede that the easy evasion of them makes it unimportant whether they are questioned or not, except that it may be considered as highly injurious to enact any law which is not or cannot be enforced, in that the successful defiance or evasion of a particular law tends to lessen one's reverence for law in general.

It has been held recently that a statute authorizing building and loan associations to charge what would under the general usury laws be usurious rates of interest, is not unconstitutional as class legislation.2

[Back to Table of Contents]

§ 107.

Prevention Of Speculation.—

Free trade is an undoubted constitutional right. Every man has the constitutional right, not only to determine with whom he will have business dealings, and to whom he shall offer his goods or his services, but he also has the right, in most cases, whether he shall offer them to any one at all. He may refuse, without giving any reasons, to sell his goods or to tender his services. He cannot ordinarily be compelled to do either. The only exceptions that suggest themselves, are cases in which the right of eminent domain is exercised,3 and those in which the State in the emergency of war makes forced sales of the property of private individuals for war purposes,1 and all cases of compulsory performance of duties to the State. In all other cases a man cannot lawfully be compelled to part with his property, or to render services against his will. Circumstances may conduce to make a particular business a virtual monopoly in the hands of one man or one partnership. But I apprehend that he cannot for that reason be subjected to police regulation. Because one man has the capital wherewith to buy up all the corn or wheat in our great Western markets, and to cause in consequence a rise in the values of these commodities, does not justify State interference with his liberty of action, any more than would police regulation of the whole capitalist class be permissible. And yet this one man occupies an economical position, differing only in degree from the capitalists as a class. The same qualities and characteristics which enable him to become a capitalist, will urge him to make the most of the wealth he has accumulated or inherited, and he will so manipulate it as to increase its returns if possible. Each successful increase in the returns from capital, increase the price of the commodity, in the manufacturing or preparation or handling of which the capital has been invested. It is only in extraordinary abnormal cases that any one man can acquire this power over his fellow-men, unless he is the recipient of a privilege from the government, or is guilty of dishonest practices. The remedy for the first case, in a constitutional government, is to withhold dangerous privileges, or if the grant of them is conducive to the public welfare, to subject their enjoyment to police regulation, so that the public may derive the benefit expected and receive no injury. In the second class of cases, a rigid prosecution of dishonest practices will be an efficient remedy.

The common law did not recognize this view of a right to be free from police regulation, in the matter of trade. While the general right to buy and sell without let or hindrance was recognized, certain sales were held to be illegal, and punished as misdemeanors, which are exceedingly common at the present day, and, if not legal, are acknowledged by the commercial world as legitimate transactions. These were sales, known at common law by the names, *forestalling, regrating,* and *engrossing.* Says Blackstone: “The offense of *forestalling* the market is an offense against public trade. This, which (as well as the two following) is also an offense at common law, was described by statute 5 and 6 Edw. 6, ch. 14, to be the buying or contracting for any merchandise or victual coming in the way to market; or dissuading persons from

bringing their goods or provisions there; any of which practices make the market dearer to the fair trade. *Regrating* was described by the same statute to be the buying of corn or other dead victual, in any market, and selling it again in the same market, or within four miles of the place. For this also enhances the price of provisions, as every successive seller must have a successive profit. *Engrossing* was also described to be the getting into one's possession, or buying up, large quantities of corn or other dead victuals, with intent to sell them again. This must, of course, be injurious to the public, by putting it in the power of one or two rich men to raise the price of provisions at their own discretion. And so the total engrossing of any other commodity with an intent to sell it at an unreasonable price is an offense indictable and finable at the common law."1 In Russell on Crimes,2 these offenses are stated as follows: "Every practice or device by art, conspiracy, words, or news, to enhance the price of victuals or other merchandise, has been held to be unlawful; as being prejudicial to trade and commerce, and injurious to the public in general. Practices of this kind come under the notion of forestalling, which anciently comprehended, in its significance, regrating and engrossing and all other offenses of the like nature. Spreading false rumors, buying things in the market before the accustomed hour, or buying and selling again the same thing in the same market, are offenses of this kind. Also if a person within the realm buy merchandise in gross, and sell the same in gross, it has been considered to be an offense of this nature, on the ground that the price must be thereby enhanced, as each person through whose hands it passed would endeavor to make his profit of it." As stated by Blackstone, these acts are no longer recognized by the American criminal law as offenses against the public, or as being in any way illegal. The purchase of merchandise, or any other commodity, that may be the subject of sale, expecting a rise in the price, in other words, speculation, is legal whether the buyer intends to sell again, in gross, or in retail. A man has a constitutional right to buy anything in any quantity, providing he use only fair means, and set his own price on it, or refuse to sell at all. Where one man, acting independently, does this, he can be only considered guilty of a wrong to the public, when he secures the possession of these things by the practice of fraud, or endeavors by false reports to enhance the price of a commodity which he offers for sale. These are distinct acts of fraud or deception, and it is proper for the law to declare them illegal. Further the law cannot go. Mr. Bishop, in discussing these common-law offenses, denies that *regrating,* as distinguishable from *forestalling* and *engrossing,* can be considered a criminal offense in this country,1 but he recognized the other two offenses, in a modified form. In respect to forestalling, he says: "In reason, the essence of the common law, on the subject of forestalling, considered distinct from engrossing and regrating, seems to be, that, whenever a man, *by false news or by any kind of deception,* gets into his hands a considerable amount of any one article of merchandise, and holds it for an undue profit, thereby creating a perturbation in what pertains to the public interests, he is guilty of the offense of forestalling."1 As stated by Mr. Bishop, the common law in making a criminal offense of forestalling is no more open to constitutional objection than the punishment or prohibition of any other act of fraud or deception. But Mr. Bishop's position, in regard to *engrossing,* is not as free from criticism. He says: "Whenever a man, for the purpose of putting things, as it were, out of joint, and obtaining an undue profit, purchases large quantities of an article of merchandise, to hold it, not for a fair rise, but to compel buyers to pay a price greatly above, as he knows, what can be regularly sustained in the market, he

may, on principle, be deemed, with us, to be guilty of the common-law offense of engrossing."2 It is, without doubt, an immoral act, to ask an unconscionably high price for a commodity, taking advantage of the pressing wants of the people; and it may, under a high code of morals, be held to be an extortion, for one to purchase and hold merchandise for the purpose of gaining from its sale more than a fair profit; but it cannot be claimed that there is a trespass upon the rights of others in doing so, or that the rights of others are thereby threatened with injury. One is simply exercising his ordinary rights in demanding whatever price he pleases for his property. But apart from this objection, the great difficulty, if not impossibility, in ascertaining what is an extortionate price, and the practical inability, to enforce it, would predetermine such a law to become a dead letter.

[Back to Table of Contents]

§ 108.

Prevention Of Combinations In Restraint Of Trade.—

While the manipulation of capital by single individuals cannot threaten the public welfare by the general oppression of the masses; when two or more people combine their energies and their capital, the acquisition of this extraordinary power becomes easier and more common. In fact, it may be stated that, practically, combination is absolutely necessary in all cases to its acquisition. But combinations are beneficial, as well as injurious, according to the motives and aims with which they were formed. It is, therefore, impossible to prohibit all combinations. The prohibition must rest upon the objectionable character of the object of the combination. One of these objectionable objects is the restraint of trade. At common law, and it is still the law in most, if not all of the States [in some there are statutory regulations on the subject], all unreasonable combinations in restraint of trade were unlawful, and no contracts, founded upon the combination, would be enforced by the courts.1

It is necessary, in view of modern statutory legislation, to accentuate the fact that at the common law, in England and in the United States alike, contracts were not necessarily void, simply because they were in restraint of trade. In order that such a contract may be declared void at the common law, the restraint had to be unreasonable in order that it may come under the ban of the law. It is undoubtedly the accepted law everywhere, in the English-speaking world, that any contract in restraint of trade, which is unlimited in its restrictions as to time, place, persons and circumstances, is void, and the courts will refuse to enforce it, or to recognize any cause of action which is based thereon.1 But wherever the contract was in restraint of trade, only to a limited degree, either as to time, persons, place or other circumstance, the contract was held to be valid and enforceable, because the limited character of the restriction prevented it from coming into conflict with public policy; the rational and beneficial character of the limited restriction outweighing the supposed injurious effect of the restraint of trade on the competition which is said to be the life of trade.2 The question, whether the contract is in unreasonable restraint of trade, is one of law for the courts, and no hard and fast line is or can be laid down by the courts, for determining *a priori* whether a particular contract in restraint of trade is unreasonable and void, or reasonable and valid. The limitations as to time, persons, place and other circumstances are considered in the light of the motive of the restriction, in order to determine in the particular case, whether the restraint is reasonable.3 The cases are very numerous in which contracts in restraint of trade are declared to be void or valid, according as they are unreasonable or reasonable. But a few cases will suffice for illustration. The contract of a lawyer, in the sale of his practice, not to practice in Great Britain, was held to be reasonable, and hence valid.1 So, also, the contract not to practice one’s profession or to carry on one’s business in a particular town or county and its vicinity.2 But where the restriction as to space is unreasonable in extent, the contract in restraint of trade would be held to be unreasonable and void. Generally, a contract not to carry on a particular business in any part of the State

would be held to be unreasonable.3 Sometimes, a contract in restraint of trade is held to be reasonable where it is unlimited as to space but limited as to time. This is possible only, where the business is of such a character that any limitation of the restraint as to space would make the restriction valueless to the purchaser of the business.4 Other cases of reasonable contracts in restraint of trade may be cited, which are not directly limited by time or space. Exclusive agencies of certain articles of merchandise in a certain territory are held to be valid contracts, although they prevent the sale of the goods through any other party.1 And the by-law of the Associated Press Association, that its members shall not receive or furnish "the regular news dispatches of any other news association covering a like territory and organized for a like purpose," was held by the Court of Appeals to impose only a reasonable restraint upon trade, and hence was valid and binding upon the parties to the contract.2 But the Supreme Court of Illinois has reached a contrary conclusion on the identical question.3

The cases, which have been cited and explained in the foregoing paragraphs, involving the determination of the contracts which are in unlawful restraint of trade, include only those agreements, having that effect, which are entered into only as a part of the consideration of the sale of a business or trade or profession, and have the reasonable and sound purpose of transferring the good will of the business to the purchaser, and protecting his right to it, by obligating the vendor to refrain from setting up a rival business in the same place or locality or for a given time. There is no motive in such contracts of enhancing prices by the creation of combinations of capital or skill.

The cases are numerous where that is the motive and apply to almost all kinds of combinations, the object of which is the extortion of the public. As expressed by one judge, "a combination is criminal, whenever the act to be done has a necessary tendency to prejudice the public; or to oppress individuals, by unjustly subjecting them to the power of the confederates, and giving effect to the purpose of the latter, whether of extortion or of mischief."1 Even where this effect is more or less remote, the combination will be void. Thus the English court has refused to enforce an agreement, entered into by several employers in the same line of business, to suspend or carry on the business, in obedience to the direction of the majority.2 So also, are all combinations among employees void, whose object is the restraint or control of a particular trade. The obligations of the individual member to obey the orders of the league or combination, to refuse to offer his services to one, against whom the combination is directed, cannot be enforced in the courts.1

Labor organizations are very common in this country, and a consideration of their rights and powers inside of the law is therefore necessary. It can hardly be denied that so far as these organizations have charitable objects in view, the care of their sick and indigent members, the dissemination of useful literature among them and their enlightenment on matters connected with their trade, they are lawful. For such purposes, the formation of associations can never be prohibited in any free State. Their prohibition would be a violation of constitutional liberty. But so far as these combinations have for their object the control of trade, and of the price of labor, they constitute combinations in restraint of trade, and all contracts founded upon them are

void. A successful combination of labor will raise the price of labor and hence the cost of the commodity above its normal value in the same manner as the combination of capitalists will increase the cost of the commodity by increasing the return to capital. Free trade is only possible by a prohibition of both classes of combinations which, if successful, are equally dangerous to the public safety and comfort.2

[Back to Table of Contents]

§ 109.

A Combination To "Corner" The Market.—

One of the commonest cases of combinations in restraint of trade, is where two or more dealers in a staple commodity undertake to "corner the market." Dos Passos defines "a corner" in the following language: "A scheme or combination of one or more 'bulls' who are 'long' of certain stocks or securities, to compel the 'bears,' or persons 'short' of the stock to pay a certain price for the same. Or it may be a combination to force a fictitious and unnatural rise in the market, for the purpose of obtaining the advantage of dealers, purchasers, and all persons whose necessities or contracts compel them to use or obtain the thing 'cornered.'"[1] In New York, Illinois, Georgia, and Nebraska, there are statutes prohibiting "cornering," and providing remedies for the breach of the statute, but it is safe to assert that the act is unlawful at common law, and independent of statute. A combination to raise funds, or create fictitious prices by the spread of false rumors, is clearly criminal conspiracy, for it injures every one who would have to make purchases of the commodity and were compelled to pay a higher price in consequence of the false rumors.[2] So, also, will a combination be void, which is formed for the purpose of enhancing the price of a commodity by the making of fictitious sales. There is as much fraud in these cases as where the combination attained their ends by setting false rumors in motion. In both cases there is a fraud against the public.[3] These cases are plain, because in both classes of cases there is a distinct act of deception or fraud. But the illegality of combinations is pushed to the extreme limit, when it is held that a combination to enhance the price of a commodity is always unlawful, even where there is no deception or fraud, and when the combination do nothing more than hold the goods which they control for higher prices. But that is the common-law rule. Such combinations are quite common in later days, and public opinion is very tolerant of them, rarely, if ever, condemning the practice as immoral; but there can be no question concerning their illegality. In Raymond *v.* Leavitt,[1] plaintiff loaned defendant $10,000 for purpose of controlling the wheat market at Detroit for parties called the May *deal.* The scheme was "to force a fictitious rise in values." The court held that the money advanced for the purpose of making a "corner" in wheat, could not be recovered by any legal measures and this, too, independently of statute. "There is no doubt that modern ideas of trade have practically abrogated some common-law doctrines which are supposed to unduly hamper commerce." * * * "But we do not feel called upon to regard so much of the common law to be obsolete as treats these combinations as unlawful, whether they should now be held punishable as crimes or not. The statute of New York, which is universally conceded to be a limitation of the common-law offenses, is referred to in Arnot *v.* Coal Co.,[2] rendering such conspiracies unlawful, and this had been previously held in People *v.* Fisher,[3] where the subject is discussed at length. There may be some difficulty in determining such conduct to be in violation of public policy, where it has not before been covered by statutes as precedents. But in the case before us the conduct of the parties comes within the undisputed censure of the laws of the land, and we cannot sustain the

transaction, *without doing so on the ground that such dealings are so manifestly sanctioned by usage and public approval, that it would be absurd to suppose the legislature, if attention were called to them, would not legalize them.* We do not think public opinion has become so thoroughly demoralized; and until the law is changed, we shall decline enforcing such contracts. If parties see fit to invest money in such ventures, they must get it back by other than legal measures."4

Of the same character would be an agreement between all the transportation companies of a particular territory, which was made for the purpose of preventing competition, and controlling the rates of charges for transportation. Such agreements are void.1 The only ground upon which the prohibition of combinations in such cases may be justified is that such combinations tend to give to the members of them an undue and dangerous power over the needs and necessities of the people; and for that reason it is a legitimate exercise of police power to prohibit such combinations. Such a law does not interfere with the equal freedom of all to do what they will with their own. Every one is left free to do or act as he pleases, but he is not allowed to deny to others an equal freedom, not even with their consent. Public policy, the public safety, requires the prohibition.

Since the common law made it an indictable offense for one man to "corner" the market, there can be no question that the combination of two or more to buy up any article of merchandise, and force the payment of exorbitant prices, is a criminal conspiracy, and may be punishable without further legislation, if public opinion did not look so leniently upon such transactions.2

[Back to Table of Contents]

§ 109a.

Contracts Against Liability For Negligence Prohibited.—

The liability for negligence is imposed by the law, and does not arise out of the contract of the parties. The duty, in the performance of which the negligence occurred, may arise out of, and rest upon, contract; but the exercise of care in the performance of a duty, whether the duty is legal or contractual, is an obligation often of general application. Ordinarily, the performance of a legal duty, or the liability for an improper performance, may be waived by agreement of the persons who may be affected by it. The law does not ordinarily compel persons to avail themselves of the protection it affords them. But where the duty is of so general a nature, as that the proper performance of it, even where the private individual is most affected by it, becomes a matter of public policy, the right may very properly be denied to the private individual to relieve another by contract from the liability for improper performance. A private person, probably, cannot be forced to sue on the tort, but the law may declare void any contract, by which he relieves the person, on whom the duty rests, from liability. This is the rule at common law in respect to liability for negligence. No man can by contract relieve himself from liability for negligence in the performance of any duty to the public generally, or to a particular individual, whether the duty arises out of a contract or is imposed by the law; but particularly so where the law imposes the duty. This restriction upon the contracts of individuals has particular application to contracts with common carriers and telegraph companies. In respect to the common carrier, the common law imposed the obligation to guarantee the safe delivery of the goods intrusted to his care for transportation, and he is liable for the failure to deliver them at the place of destination in every case, except where they are proven to have been destroyed by the intervention of some unavoidable natural agency, or by the act of the public enemy. The exercise of the highest degree of care constitutes no defense. Public policy requires the imposition of this extraordinary obligation.[1] But the imposition of this extraordinary obligation is not deemed to be so far required by public policy, as that parties may not be permitted by contract to release the carrier from it. Common carriers may limit their common-law liability to acts of negligence by contract with the consignor. But the contract must be freely and voluntarily made. The carrier cannot refuse to take goods for carriage under the common-law liability, if the consignor should refuse his assent to a limitation.[1] But public policy would not permit the enforcement of a contract, which not only released the carrier of his common-law liability as an insurer, but likewise from the consequences of his negligence. It is the almost invariable rule of law in the United States, that common carriers are forbidden to relieve themselves by contract from liability for injuries caused by the negligence of the carrier or his servants. This is the rule of law, whether the carrier be a natural person or a corporation.[2] In New York and New Jersey, it has been held not to be against public policy for common carriers to make contracts, whereby to release themselves from liability for the negligence of their servants, although it is forbidden them to divest themselves of responsibility for their own negligence; and in case of railroad corporations this principle has been

carried so far as to enable a release from liability for the negligence of every agent of the corporation, except the board of directors.1 The prohibition of contracts in release of liability for negligence is the same, whether it refers to the carriage of goods or of passengers. In the latter cases, such contracts are against public policy, and therefore, void, even where the passenger is traveling on a free pass, whether the pass is given in conjunction with the transportation of freight for hire, as in the case of "drover's passes,"2 but also where it is given as a matter of courtesy.3 The cases generally maintain that the common carrier is held to the same degree of care, whether the carriage is gratuitous or for a consideration, but it would seem but natural to require of the common carrier, in cases of free passes, only that degree of care, which is required of all bailees, where the bailment is exclusively for the benefit of the bailor, viz.: slight care, and it has been so held in Illinois.4

The same restriction against contractual releases from liability for negligence has been applied to telegraph companies, but with a notable exception. The general rule, that one can not by contract relieve himself from responsibility for negligence, applies. But in consequence of the great liability to the commission of errors in the transmission of messages; arising from the limited control over the electrical current, and the great exposure to accidents to the wires, and to the electrical apparatus at both ends; it has very generally been held to be a reasonable and permissible stipulation, that the telegraph company will not be responsible for errors in transmission of messages, whether they arise from the intervention of natural causes or the negligence of the operators, unless the message is repeated. Such a contract would be equivalent to an agreement to send the message for a less sum, upon condition of being relieved from liability for errors or delays.1

[Back to Table of Contents]

§ 110.

Common Law Prohibition Of Combinations In Restraint Of Trade Restated.—

As it has been fully explained in the two preceding sections, leaving out of consideration the ancient and obsolete English statutes against forestalling, regrating, etc., the common law,—as it comes to us, and as it has been enunciated by the courts in earlier cases, which have been cited in the preceding two sections—in declaring against contracts whose enforcement tended to restrain trade and commerce, limited its prohibition in two ways: *First,* it did not punish the parties to such contracts for making them, and confined its prohibition to a refusal to enforce the contract which fell under its ban, because such contract was against public policy, in that it tended to restrain trade and competition to the prejudice of the public welfare. *Secondly,* it did not declare all contracts in restraint of trade to be against public policy; only those which, according to judicial opinion, were in *unreasonable* restraint of trade, not only permitting but enforcing some contracts, because they were reasonable, although their enforcement did operate to restrain trade and limit competition.1

In the further prosecution of this subject, it will be seen that in both particulars the common law has been changed by modern legislation in the United States. But before proceeding to the exposition of the recent legislation in the United States, I desire to make still more positive the accuracy of my two propositions, in regard to the scope of the common law prohibition of contracts in restraint of trade, by a very full reference to two important recent cases in the English and New York courts.

The first case arose in the English courts.2 A large number of owners of ships, which were employed in carrying freight from the same English ports, entered into an association which brought all the freight business of the members under the regulation of the association; the by-laws of the association to control the number of ships of each member, the division of the cargoes and freights, and the general management of the carrying business of that port. In order to make their control of the business complete, the association offered a rebate of five per cent on all freights to shippers who shipped their goods exclusively on the ships controlled by the association; and prohibited their freight agents, on penalty of removal, from being directly or indirectly interested in securing freight for competing ship-owners. Any member of the association was privileged to withdraw from the combination at any time upon giving the stipulated notice. The association then reduced the rates of freight to such a degree that an independent ship-owner could not, except at a ruinous loss, compete with the associated ship-owners. A virtual monopoly, as described by the Supreme Court of the United States in Munn *v.* Illinois, was thereby created. The plaintiffs, who were among the ship-owners, who were not members of the association, undertook to compete for the carrying trade of that port, by sending ships there in search of cargoes, but failed because of the overwhelming power of the association. The only difference, but certainly an important one, between the virtual monopoly of the

Chicago Elevator Companies which was the subject of regulation in Munn *v.* Illinois, and the virtual monopoly of these associated ship-owners, was that the combination of elevator owners was charged with the design of extorting exorbitant charges for the storage of grain from the shippers; whereas, the English combination in this case was charged with the conspiracy, by lowering rates of freight to such a degree that an independent ship-owner could not successfully compete with the combination, to stifle all competition, and thus secure a complete monopoly of the carrying business from that port.

The English courts, from the initiatory trial up to the appeal to the House of Lords, denied that the associated ship-owners had been guilty of any conspiracy at the common law, for which they were amenable to the plaintiffs, either criminally or civilly, although the agreements of the associated ship-owners were clearly contracts in restraint of trade, which the courts would have refused to enforce between the members thereof. Full quotations from the opinions of the courts are given in the note below.1

It will be observed that the English court held that in order that a combination of capitalists may make out a case of actionable conspiracy at the common law, they must use unlawful means, such as fraud or other dishonesty, intimidation, molestation or actual malice. It was not sufficient that the inevitable effect of the combination was to drive the plaintiffs out of business, if only the ordinary tactics of commercial warfare were employed.

In the case, arising in the New York courts, the Diamond Match Company had purchased the factory of one Roeber and the good-will of his business, with the agreement that Roeber should not engage, during his natural life, in the business of manufacturing and selling matches in any part of the United States, with the exception of Montana. In a suit, brought by the Diamond Match Company, to compel Roeber to carry out his agreement to abstain from engaging in the same business, anywhere except in Montana; the Court of Appeals held this agreement to be only in reasonable restraint of trade, and was lawful and binding. The court went so far in its opinion as to intimate that the exception of Montana is not essential to the validity of the contract, if the agreement did not include territory which was beyond the sphere of the business transferred in connection with the contract in restraint of trade. The alleged motive of the purchaser of the business to establish a monopoly was held to have no effect upon the validity or invalidity of the agreement that the vendor shall abstain from establishing a rival business.1

But the fact, that the common law did not punish, either criminally or civilly, those who enter into combinations for the prevention of competition, does not necessarily indicate any constitutional objection to statutory changes of the law, whereby criminal or civil remedies are provided for preventing the formation of monopolistic combinations. If the restrictions upon competition and trade is against public policy, and may for that reason be declared illegal, so that the courts may lawfully refuse to the parties to a contract in restraint of trade the right to enforce such a contract or agreement by judicial process; there can be no serious question concerning the power of the State to make such restrictions upon trade and combinations in restraint of trade

criminal misdemeanors, or to give to parties suffering from them civil actions for damages, if in the estimation of the legislature the public welfare should require it. The power to declare an act unlawful being admitted, the choice of remedies for its prevention is wholly within the discretion of the legislative power.[1]

[Back to Table of Contents]

§ 111.

Industrial And Corporate Trusts, As Combinations In Restraint Of Trade.—

It does not take a very keen observer to note that, for the past fifteen or twenty years, the tendency to the establishment of all-powerful and all-controlling combinations of capital, in the prosecution of all kinds of business, has been increasing year by year in this country. This is an undoubted economic phenomenon of the modern world and nowhere is it more manifest or stronger than it is in the United States. The rapid accumulation of vast fortunes has inspired some of their possessors with the desire for the acquisition of power through the control of industries of such great extension and scope, that they may earn the appellation of *kings* instead of *princes* of industry. If this economic tendency were left unchecked, either by economic conditions or law, the full fruition of it would be a menace to the liberty of the individual, and to the stability of the American States as popular governments, so great that the fear of the people of England, of the danger which threatened them from the dream of Thelusson that the provisions of his will would make his posterity one of the powerful families of England,[1] would seem in comparison to take on the form of opera bouffe.

The first distinct manifestation of this growing tendency to the formation of large combinations of capital is the rapid increase of industrial corporations, so that the United States exceeds all other countries in the number and variety of private corporations, and in the amount of their aggregate capital. But for many financial reasons, the size of an industrial corporation is necessarily limited; and it is a common thing to find a number of corporations, having large capital, in the same business or industry, competing with each other, and forcing the price of commodities and services down so low that the returns on the capital invested grow less and less, until the rival corporations find themselves unable to declare any dividends at all. Contracts or agreements, entered into by these competing corporations, to maintain a certain scale of prices, and to raise or lower prices in concert, and in obedience to the rulings of the association, have not always proved effectual in suppressing ruinous competition; because, as we have seen in preceding sections, such contracts are in restraint of trade, and therefore non-enforceable in the courts. A financial genius in the United States proposed that, to secure absolute uniformity in the management and conduct of a business by a number of rival corporations, all the stockholders of the several corporations should transfer to a board of trustees their respective holdings of stock in the different corporations and receive back from the trustees trust certificates, representing their rights in the stock certificates. Under the terms of the deed of trust, the trustees, who thus appeared as the voting stockholders in each one of the corporations, would conduct the business of all of them as one business and in accordance with the plans and principles of action, which had been decided upon by the trustees. And the profits of the joint business of these corporations would be distributed among the stockholders *pro rata* on their trust certificates. Under such an ingenious scheme, there was no difficulty in enforcing obedience to the command of

the association on the part of the corporations, which composed the combination; for the trustees, as the holders of a controlling interest in the stock of each one of the corporations, could secure, in the corporate meetings of each one, corporate adoption of the policy which had been formulated by the trustees.

Thus was established a form of combination in restraint of trade, which was limited only by the amount of capital which was invested in the joint enterprise and which did not need the special sanction of the law, or its intervention by judicial process, in order to enforce the decrees of the combination upon all its members. Nor would it appear that such a trust, apart from the motive of its creation, differed in legal character from the thousand and one active trusts, whose legality has never been questioned.

If, in the creation of such a trust, the parties thereto had violated any rule of law, it must be in some secondary matter, and not directly. For independently of modern statutes, which will be considered in the next section, no combination of capital with monopolistic intent is so far declared illegal as to subject the participants therein to any criminal or civil liability. The most that the common law did in discouraging such combinations was to ignore them, and deny the aid of judicial process in enforcing the agreements on the members of the combination. And the need of judicial process had been obviated by these creators of the industrial trust.

The original industrial trust was the Standard Oil Trust. Possibly, the next great trust to be formed was the American Sugar Trust. Since then a large number of so-called trusts have been formed, viz.: Milk, rubber, cotton-seed oil, butchers', glass, furniture, etc. But it needs to be stated in this connection that the phrase "industrial trust" has been made to serve in the popular mind, as well as in legislative enactments, as a general term, to include all sorts and conditions of combinations of capital in restraint of trade, wherever the motive of the combination is shown to be the establishment of a virtual monopoly in any particular industry, it matters not what form the combination may take, and whether the combination involved the creation of a trust or not. I desire to have it plainly understood that what I have to say in the present section has reference only to those combinations in restraint of trade, in which the object of the combination is attained by the application of the ordinary law of trusts to the particular conditions of industrial competition and the corporate rights and powers, under the general law of corporations. In view of the fact that many of these so-called trusts have been formed and have been declared to be illegal, since the enactment of statutes, which have provided for the avoidance and punishment of all combinations in restraint of trade, care must be observed in applying the propositions here set forth in the present section, to any but the Standard Oil and the Sugar Trust. To make still clearer the sense in which the term "industrial trust" is here employed, I will define it, using the language of Mr. Charles W. Baker, found in his book "Monopolies and the People:" "A trust is a combination to restrain competition among producers, formed by placing the various producing properties (mills, factories, etc.) in the hands of a board of trustees, who are empowered to direct the operations of production and sale, as if the properties were all under a single ownership and management."[1]

If a number of individuals or partnerships or of individuals and partnerships, all engaged in the prosecution of the same business, were to transfer their businesses, plants and capital to two or more trustees, who were charged with the joint management of the business and property of all the parties to the trust deed, so as to secure the exclusive control of the business, such a trust would clearly come within the provisions of the law of trust, and would be legal and operative, as long as the purpose of the trust was not declared by statute to be an actionable wrong. And if the parties to the Standard Oil and Sugar Trusts had been individuals or partnerships, the judgments, pronouncing their dissolution, would not have been delivered; for such trusts when composed of individuals, were, prior to the enactment of anti-trust statutes, lawful combinations, so far as the parties thereto were not liable to any criminal or civil action on account of their participation therein; while they were illegal restraints upon trade, in that the courts would not aid them in enforcing any executory agreements of the trust. But these trusts were composed of stockholders of competing corporations, engaged in the same business, and that fact gave the courts the opportunity to destroy the trusts by destroying the corporations, whose stockholders composed the trusts. The courts of New York and Ohio held that the corporations which composed the trusts, through the joint actions of their respective stockholders, had exceeded their corporate powers, by transferring the complete control of their respective properties and businesses to a board of trustees, to such a degree that their charters became subject to forfeiture.[1]

In a recent case in New York, a gas company of the city of Buffalo, entered into a contract to issue its own stock in exchange for all the stock of a competing company. This was done to put an end to the ruinous competition between them. It was held by the Appellate Division of the Supreme Court that this contract did not involve the creation of a monopoly, in contravention of Section 7 of the corporation law.[1] But did not the competing company's stockholders violate the rule of the sugar trust case by transferring their stock to the first gas company, and receiving the latter's stock in exchange? Did not this primary corporation take the stock assigned as trustees, in the absence of a technical consolidation of the two companies?

The most striking evidence of the persistency of the economic demand for large combinations of capital in one business under one management, and the consequent establishment of virtual monopolies, is the various methods pursued by the trusts, whose dissolution was forced by these adverse judgments of the courts. The affairs of the Standard Oil Trust were placed in the hands of receivers for final settlement and winding up of its business. These receivers issued trust certificates, transferred them as they were sold and bought, and otherwise conducted this immense business, as if there had been no decree of dissolution; and, although some years had elapsed, the receivers were no nearer the conclusion of their business than they were immediately after their appointment; until, in the year 1899, the activity of the Ohio courts, in forcing the trust to a settlement of its affairs, compelled the capitalists interested to follow the example of the sugar trust, as explained in subsequent paragraphs of the present section, and to form one huge corporation, under the laws of New Jersey, combining all the interests and plants of the old trust under one corporate management.

The Chicago Gas Trust was formed into a duly incorporated company, one of the objects of whose incorporation, as was stated in the certificate of incorporation, was "to purchase and hold or sell the capital stock, or purchase or lease, or operate the property, plant, good-will, rights and franchises of any gas works, or gas company or companies," and the Supreme Court of Illinois has held the incorporation to be illegal.1

It would seem that the corporation law would be equally violated, if, for the purpose of effecting a large combination of capital in a particular industry and the consequent creation of a virtual monopoly therein, a corporation were to enter upon the general policy of leasing the plants and other property of a rival corporation. And this has been the conclusion of the courts.1 Indeed, the strength of the demand for restrictions upon the creation of virtual monopolies is not more strikingly demonstrated than in the proposition laid down by a number of our courts, that, while a private corporation, whose business is not affected with a public interest, without express authority from the legislature, may sell all its property and plant to another corporation, and the sale be in every way valid;2 it is not so, if the business is affected with a public interest, which is interpreted to mean that the business is such in its proportions and its control over some article of necessity, that a grievous monopoly may thereby be created. In such a case, it has been held to be unlawful for a corporation, without express legislative authority, to make a complete transfer of its plant, property and franchises.3 But it has been held in a recent case that the mere fact, that a linseed oil company had been purchasing a large number of oil mills and plants throughout the country, and was doing an extensive business, would not constitute a violation of the anti-trust laws.1

As long as the corporation law is not changed, the only successful method of circumventing the judicial antagonism of large trade combinations and virtual monopolies, is that which was adopted by the American Sugar Trust, viz.: the corporate consolidation of all the corporations which had composed the trust. As long as the corporation law of the State does not limit the capital and volume of business of a corporation, the consolidation of two or more corporations into one is clearly legal, even though the object of the consolidation be to suppress competition and to establish a virtual monopoly; except where the mere purpose of suppressing competition by lawful means is prohibited by the anti-trust statutes.2

[Back to Table of Contents]

§ 112.

Modern Statutory Legislation Against Trade Combinations, Virtual Monopolies, And Contracts In Restraint Of Trade.—

Finding that the common law was insufficient to suppress or even restrain the growth of large trade combinations, public opinion in this country has demanded and secured the enactment in almost every State of statutes, which not only declare all contracts and combinations in restraint of trade to be non-enforceable, as the common law treated unreasonable restraints of trade; but went further, and made two modifications of the common law, which are found in all of these statutes, however variant in detail they may be in other respects, viz.: *first,* that the act of entering into such a combination or contract is itself an actionable conspiracy, which is punishable criminally or actionable civilly, according to the provisions of the particular statute; and, *secondly,* that *all* contracts, agreements, or combinations, which have the purpose or effect of restraining trade and suppressing competition, are illegal, whether the restraint was reasonable or unreasonable. Even Congress was prevailed upon to pass such an act. In the note below, the United States and New York anti-trust statutes are given in full, so far as they bear upon the subject under inquiry, and the synopses of the statutes in some of the other States are added, so that the reader may appreciate the sweeping changes, which these statutes have made in the common law, relating to the same matters.1

It is believed that the constitutionality of none of these numerous anti-trust statutes has been successfully questioned on the ground that they infringed the personal liberty of contract, in punishing civilly or criminally the entrance into a contract or combination in unreasonable restraint of trade. That such contracts and agreements are void, independently of statute and at the common law,—so far, at least, as to justify the courts in refusing to enforce them or in any other way to give the parties to them the aid of judicial process in protecting and enforcing the rights of parties, which grow out of such contracts and agreements—have been too long the settled rule of law, to admit of any serious question now. And the power of the State to declare such contracts unlawful being conceded it is completely within the discretion of the legislature to determine whether such unlawful contracts and combinations shall be simply ignored by the courts, or the parties to them be subjected to criminal or civil liabilities for violating the law in undertaking to restrain trade and stifle competition. The Texas Anti-trust law was held by an United States judge to be unconstitutional as being class legislation, in that it excepts from the force of its provisions the combinations of producers or raisers of agricultural products and live stock.1 And it would seem as if the exception would justify the conclusion. The same judge pronounced the law unconstitutional on the further ground that it violated the Fourteenth Amendment of the Constitution of the United States, in that it denies to citizens of the United States, the right to make valid contracts with respect to their business and property.2 But the constitutionality of the statute has been sustained by the Supreme Court of Texas;3 and I know of no decision of a court of last resort,

either Federal or State, in which an anti-trust law was held to be unconstitutional, because it invaded the liberty of contract in prohibiting the individual from entering into combinations to restrict trade or create virtual monopolies.

But these statutes have, as already stated, made another equally important change in the common law. As it has been very fully explained in preceding sections,[1] at common law, as it came to us from England at the time of the Revolution, only those contracts were declared to be void as against public policy which produced an *unreasonable* restraint upon trade and competition. The mere fact, that the contract was one in restraint of trade, did not make it void at common law. The scope and purpose of the contract or combination in restraint of trade had to be *unreasonable* and injurious to the public welfare, before the courts would pronounce it void as against public policy. But many of these modern statutes, if not most of them, including those of the United States and of New York, go further and declare all such contracts and combinations unlawful and all persons amenable to the punitory provisions of the respective statutes, who enter into such contracts and combinations, which have either the effect or purpose of restraining trade, restricting competition and creating monopolies in trade. Some of them, like the Michigan statute, expressly exclude contracts for the sale of the good-will of a business. In a recent case, it has been held in New York that a contract in connection with the sale of the good-will of the business, that the seller will not compete with the buyer within a specified area, did not violate the anti-trust law.[2] On the other hand, in most of these statutes, there is no such exception.[3] The statutes have been assailed on the ground of unconstitutionality, because they worked an unlawful infringement of the liberty of contract in prohibiting contracts and combinations in restraint of trade, which were reasonable, and hence could not be pronounced injurious to the public welfare. Several of the cases, in which this point was raised, deserve more than a passing consideration.

The first case, to which attention is called, is one arising under the New York statute.[1] The defendant was a member of an association of retail coal dealers in the town of Lockport, N. Y. The association was formed for the purpose of regulating the retail price of coal, at a figure which assured the dealers a reasonable profit, and of preventing under-bidding of each others by rival dealers. The by-laws of the association prohibited any member from selling at any other price than that which was fixed by the vote of five-sixths of the members, and provided that at no time should the price be more than $1.00 per ton in advance of the wholesale price, unless a higher advance be ordered by the unanimous vote of the members. In holding the law to be constitutional, and the association an illegal conspiracy, the court said: “The defendants gave evidence tending to show (and of this there was no contradiction) that before and at the time of the organization of the exchange the excessive competition between the dealers in coal in Lockport had reduced the price below the actual cost of the coal and the expense of handling, and that the business was carried on at a loss. It was not shown that the prices of coal, fixed from time to time by the exchange, were excessive or oppressive, or were more than sufficient to afford a fair remuneration to the dealers. The trial judge submitted the case to the jury upon the proposition that, if the defendants entered into the organization agreement for the purpose of controlling the price of coal and of managing the business of the sale of

coal, so as to prevent competition in price between the members of the exchange, the agreement was illegal; and that if the jury found that this was their intention, and that the price of coal was raised in pursuance of the agreement to effect its object, the crime of conspiracy was established. The correctness of this proposition is the main question in the case. If a combination between independent dealers, to prevent competition between themselves in the sale of an article of prime necessity is, in the contemplation of the law, an act inimical to trade or commerce, whatever may be done under and in pursuance of it, and although the object of the combination is merely the due protection of the parties to it against ruinous rivalry, and no attempt is made to charge undue or excessive prices, then the indictment was sustained by proof. On the other hand, if the validity of an agreement, having for its object the prevention of competition between dealers in the same commodity, depends upon what may be done under the agreement, and it is to be adjudged valid or invalid according to the fact whether it is made the means for raising the price of a commodity beyond its normal and reasonable value, then it would be difficult to sustain this conviction; for it affirmatively appears that the price fixed for coal by the exchange did not exceed what would afford a reasonable profit to the dealers. The obtaining by dealers of a fair and reasonable price for what they sell does not seem to contravene public policy, or to work an injury to individuals. On the contrary, the general interests are promoted by activity in trade, which cannot permanently exist without reasonable encouragement to those engaged in it. Producers, consumers and laborers are alike benefited by healthful conditions of business."

This was held not to be the question.

"The question is, was the agreement, in view of what might have been done under it and the fact that it was an agreement, the effect of which was to prevent competition among the coal dealers, one upon which the law affixes the brand of condemnation? It has hitherto been an accepted maxim in political economy that competition is the life of trade. The courts have acted upon and adopted this maxim in passing upon the validity of agreements, the design of which was to prevent competition in trade, and have held such agreements to be invalid. * * *

"The gravamen of the offense of conspiracy is the combination. Agreements to prevent competition in trade are in contemplation of law injurious to trade, because they are liable to be injuriously used. The present case may be used as an illustration. The price of coal now fixed by the exchange may be reasonable in view of the interests both of dealers and consumers, but the organization may not always be guided by the principle of absolute justice. There are some limitations in the constitution of the exchange, but these may be changed, and the price of coal may be unreasonably advanced. It is manifest that the exchange is acting in sympathy with the producers and shippers of coal. Some of the shippers were present when the plan of organization was considered, and it was indicated on the trial that the producers had a similar organization between themselves. If agreements and combinations to prevent competition in prices are or may be hurtful to trade, the only sure remedy is to prohibit all agreements of that character."

The charge to the jury was sustained and the verdict affirmed. The next case is from the Supreme Court of the United States,[1] arising under the United States Anti-trust law. An association had been formed between certain competing railroads "for the purpose of mutual protection by establishing and maintaining reasonable rates, rules, and regulations on all freight traffic." The United States Supreme Court held this to be an unlawful combination in restraint of trade, under the national anti-trust law of 1890. In delivering the opinion of the court, Mr. Justice Peckham said in part:—

"It is now with much amplification of argument urged that the statute in declaring illegal every combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, does not mean what the language used therein plainly imports, but that it only means to declare illegal any such contract which is in unreasonable restraint of trade, while leaving all others unaffected by the provisions of the act; that the common law meaning of the term 'contract in restraint of trade,' includes only such contracts as are in *unreasonable* restraint of trade, and when that term is used in the Federal statute, it is not intended to include all contracts in restraint of trade, but only those which are in unreasonable restraint thereof.

"The term is not of such limited signification. Contracts in restraint of trade have been known and spoken of for hundreds of years both in England and in this country, and the term includes all kinds of those contracts which in fact restrain or may restrain trade. Some of such contracts have been held void and unenforceable in the courts by reason of their restraint being unreasonable, while others have been held valid because they were not of that nature. A contract may be in restraint of trade and still be valid at common law. Although valid, it is nevertheless a contract in restraint of trade, and would be so described either at common law or elsewhere. By the simple use of the term 'contract in restraint of trade,' all contracts of that nature, whether valid or otherwise, would be included, and not alone that kind of contract which was invalid and unenforceable as being in unreasonable restraint of trade. When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several States, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone, which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress. * * *

"The arguments which have been addressed to us against the inclusion of all contracts in restraint of trade, as provided for by the language of the act, have been based upon the alleged presumption that Congress, notwithstanding the language of the act, could not have intended to embrace all contracts, but only such contracts as were in unreasonable restraint of trade. Under these circumstances we are, therefore, asked to hold that the act of Congress excepts contracts which are not in unreasonable restraint of trade, and which only keep rates up to a reasonable price, notwithstanding the language of the act makes no such exception. In other words, we are asked to read into the act by way of judicial legislation an exception that is not placed there by the law-making branch of the government, and this is to be done upon the theory that the impolicy of such legislation is so clear that it cannot be supposed that Congress intended the natural import of the language it used. This we cannot and ought not to

do. That impolicy is not so clear, nor are the reasons for the exception so potent, as to permit us to interpolate an exception into the language of the act, and to thus materially alter its meaning and effect. It may be that the policy evidenced by the passage of the act itself will, if carried out, result in disaster to the roads, and in a failure to secure the advantages sought from such legislation. Whether that will be the result or not, we do not know and cannot predict.

"These considerations are, however, not for us. If the act ought to read as contended for by defendants, Congress is the body to amend it and not this court, by a process of judicial legislation, wholly unjustifiable. Large numbers do not agree that the view taken by defendants is sound or true in substance, and Congress may and very probably did share in that belief in passing the act. The public policy of the government is to be found in its statutes, and when they have not directly spoken, then in the decisions of the courts and the constant practice of the government officials; but when the lawmaking power speaks upon a particular subject, over which it has constitutional power to legislate, public policy in such a case is what the statute enacts. If the law prohibit any contract or combination in restraint of trade or commerce, a contract or combination made in violation of such law is void whatever may have been theretofore decided by the courts to have been the public policy of the country on that subject."

In the courts below, in this Freight-Association case, the association was held not to have violated the Anti-Trust law in that the purpose of the organization was shown by the terms of agreement as well as by the reasonableness of the rates of freight agreed upon, to be the prevention of freight-rate wars among themselves, and not the exaction of extortionate rates. These courts held that the act of Congress was designed to prevent and punish the making of those contracts and combinations in restraint of trade, which were held by the courts, independently of and prior to the enactment of the statute, to be against public policy, because of their unreasonableness.

"The test of the validity of such contracts or combinations is not the existence of restriction upon competition imposed thereby, but the reasonableness of that restriction under the facts and circumstances of each particular case. Public welfare is first considered, and, if the contract or combination appears to have been made for a just and honest purpose, and the restraint upon trade is not specially injurious to the public, and is not greater than the protection of the legitimate interest of the party in whose favor the restraint is imposed reasonably requires, the contract or combination is not illegal."[1]

The same question was raised before the Supreme Court of the United States in the Joint Traffic Association, the purpose of which association was stated in the preamble of the articles of agreement to be "to aid in fulfilling the purpose of the interstate commerce act, to co-operate with each other and adjacent transportation associations, to establish and maintain reasonable and just rates, fares, rules and regulations on State and interstate traffic, to prevent unjust discrimination and to secure the reduction and concentration of agencies and the introduction of economies in the conduct of the freight and passenger service."

The court, speaking through Mr. Justice Peckham, affirmed the judgment of the court in the case of the Trans-Missouri Freight Association, and declared the Joint Traffic Association to be, under the act of Congress of 1890, an unlawful combination in restraint of trade, although it was conceded that the purpose of the association was not to practice extortion upon the public, but to protect the railroads composing the association from ruinous competition among themselves.1

The position, taken by the United States Supreme Court and the New York Court of Appeals, has been indorsed and taken by the other courts of the country, in construing the operation and scope of the anti-trust laws, in a number of cases. The Kansas City Live-stock Association, formed to restrain but not to stifle competition, was held to be unlawful.1

In New York, it was held that in order that the combination may come within the prohibition of the anti-trust laws, the commodity dealt in by the combination need not be an article of necessity.1 It has been held in Nebraska that a laundry is not a manufacturing establishment so as to bring a combination of proprietors of laundries within the condemnation of the anti-trust law of that State, which prohibits combinations of manufacturers and dealers.2 It has been held in Indiana on the other hand, that a combination of gas companies, to fix and maintain the price of gas, violates the anti-trust law.3 It has been held in a number of States, that all contracts and agreements between fire insurance companies for the establishment of uniform rates of premium, are in violation of these anti-trust statutes.4

The courts have gone still further in the application of these statutes, and have held them to apply to the formation of a corporation with the avowed purpose of controlling the trade and the price of a commodity of general use. The mere purpose to create a corporation, large enough and powerful enough to drive all other competitors out of the business, brings the parties to the combination within the comdemnation of the law.5

But where there is no such purpose to create a monopoly, but only the lawful purpose of putting an end to litigation of rival corporations over their conflicting interests, the consolidation of the corporations is not illegal, as tending to create a monopoly, particularly, when the corporations hold no public franchise, like a railroad, and their output comprises but a small portion of the same product in the country.1 It has been also held in Illinois, that a linseed oil company does not violate the anti-trust law, merely by buying up a great many oil mills and plants, and developing their business into large proportions.2

The same conclusion was reached in a Rhode Island case, wherein three of four companies, who were engaged in the manufacture of oleomargarine, were consolidated as a corporation, with the object of limiting or stopping ruinous competition; and the agreement inhibited the parties thereto from engaging separately in the business for five years.3

A careful study of these statutes against combinations in restraint of trade, and of the decisions of the courts in construing and enforcing them, reveals an unmistakable, and

general and popular condemnation of the strong and apparently irresistible tendency to the concentration of capital, and of the gigantic economic power which such concentration creates. Whether a way may be discovered later to make effective this popular opposition to the creation of enormous virtual monopolies, or the anti-trust statutes, will, like the old English statutes against *forestalling* and *regrating,* ultimately fall into innocuous desuetude, cannot be foretold. If they prove to be effective in restraining the growth and enlargement of combinations of capital, they must be so reconstructed as to remove their present antagonism to economic and industrial necessities; or these necessities themselves must be changed by new inventions and the discovery of new methods of manufacture of business, whereby it becomes possible for the small dealer and manufacturer to sell his goods and products to the consumer as cheaply as can the large dealer and manufacturer. In no other way can the popular desire for the preservation of the independence of the small tradesman and artisan be realized. This popular desire seems to me to explain the real force which is back of the anti-trust legislation, and without whose support the socialistic propaganda could not get a hearing. Mr. Justice Peckham, in the case of the United States *v.* Trans-Missouri Freight Association,[1] expressed this idea very forcibly when he says:—

"It is true the results of trusts, or combinations of that nature, may be different in different kinds of corporations, and yet they all have an essential similarity, and have been induced by motives of individual or corporate aggrandizement as against the public interest. In business or trading combinations they may even temporarily, or perhaps permanently, reduce the price of the article traded in or manufactured, by reducing the expense inseparable from the running of many different companies for the same purpose. Trade or commerce under those circumstances may nevertheless be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings. Mere reduction in the price of the commodity dealt in might be dearly paid for by the ruin of such a class and the absorption of control over one commodity by an all-powerful combination of capital. In any great and extended change in the manner or method of doing business it seems to be an inevitable necessity that distress, and, perhaps, ruin shall be its accompaniment in regard to some of those who were engaged in the old methods. A change from stage-coaches and canal-boats to railroads threw at once a large number of men out of employment; changes from hand labor to that of machinery, and from operating machinery by hand to the application of steam for such purpose, leave behind them for the time, a number of men who must seek other avenues of livelihood. These are misfortunes which seem to be the necessary accompaniment of all great industrial changes. It takes time to effect a readjustment of industrial life, so that those who are thrown out of their old employment by reason of such changes as we have spoken of may find opportunities for labor in other departments than those to which they have been accustomed. It is a misfortune, but yet in such cases it seems to be the inevitable accompaniment of change and improvement.

"It is wholly different, however, when such changes are effected by combinations of capital, whose purpose in combining is to control the production or manufacture of any particular article in the market, and by such control dictate the price at which the

article shall be sold, the effect being to drive out of business all the small dealers in the commodity and to render the public subject to the decision of the combination as to what price shall be paid for the article. In this light it is not material that the price of an article may be lowered. It is in the power of the combination to raise it, and the result in any event is unfortunate for the country by depriving it of the services of a large number of small but independent dealers who were familiar with the business and who had spent their lives in it, and who supported themselves and their families from the small profits realized therein. Whether they be able to find other avenues to earn their livelihood is not so material, because it is not for the real prosperity of any country that such changes should occur which result in transferring an independent business man, the head of his establishment, small though it may be, into a mere servant or agent of a corporation for selling the commodities which he once manufactured or dealt in, having no voice in shaping the business policy of the company and bound to obey orders issued by others."

[Back to Table of Contents]

§ 113.

Different Phases Of The Application Of Anti-trust Statutes—Factor'S System—Control Of Patents—Combinations Against Dishonest Debtors—Agreements To Sell Only To Regular Dealers—Combinations Of Employers To Resist Combinations Of Employees—Department Stores.—

One of the most interesting attempts to regulate and control the price of products is what is known in trade as the factor's system. The manufacturer, who controls a large part of the country's output of the commodity, enters into an agreement with the jobbers throughout the country, under which each jobber becomes a factor or agent of the manufacturer for the sale of the goods in question, the goods remaining after shipment the property of the manufacturer, and subject to recall by him, while the jobber assumes all risks in regard to the safe custody of the goods. The jobber agrees to sell the goods at the prices fixed by the manufacturer from time to time, and not to sell similar goods manufactured by any other competing concern. If he fulfills his agreement in every particular, he receives a rebate on the price of the goods, which assures him a fair profit for handling the goods, and protects him against the under-cutting of prices by competing jobbers. The sugar and tobacco trusts inaugurated the system at the urgent request of the jobbers, throughout the country. This brief statement of the factor's contract, apart from the motive of its general execution between the manufacturer and the jobbers, discloses the ordinary legal relation of principal and factor, having no element which was unknown to such contracts at common law and prior to the enactment of the anti-trust laws. The motive was undoubtedly the maintenance of uniform prices throughout the country, and the protection of the jobber from ruinous competition. No proof has ever been made that the trusts intended to, or did charge extortionate prices; but they did certainly intend by that system to control the trade throughout the country, and drive the small manufacturer out of business.

In principle, this combination differs in nothing from the railway freight associations, and the associations of coal and milk dealers, which have been declared to come within the prohibitive provisions of the anti-trust laws.[1] And this was the conclusion of the New York courts in regard to the tobacco trust's factor's contract.[2] But a contrary conclusion has been reached by the Texas Supreme Court in a case, in which a manufacturer of windmills had granted one firm the exclusive right within a certain territory to sell his windmills, on a factor's contract, in which it was stipulated that the mills were to remain until sold the property of the manufacturer, and the factor was not to sell mills manufactured by any one else. The contract was held to be lawful, and not to fall within the provisions of the anti-trust law of Texas; for the reason, *inter alia,* that the statute did not apply to contracts between principal and agent.[3] In a still more recent case, the Texas courts have sustained the contract of a carriage

manufacturer, which granted to a Texas dealer the exclusive right to sell these carriages upon condition that he sold no others.4

Somewhat similar to these factor's contracts, in restricting competition, is the agreement of railroads and express companies, forming connecting lines of more extensive systems, to pro-rate with each other, to the exclusion of other competing companies. The Federal Circuit Court has held, that a contract between two connecting railroads—providing for an interchange of passengers and freight between them, to the exclusion of other competing railroads, by the issue of through tickets and bills of lading only over each other's roads—was not in violation of the Federal anti-trust law.1

A combination of manufacturers of drugs and of wholesale druggists, formed for the purpose of maintaining the prices of proprietary drugs, violates the anti-trust law by refusing to sell goods to a retailer who cuts prices.2

Considerable litigation has arisen out of the combinations of manufacturers of articles, the exclusive manufacture of which is secured by letters-patent. The decisions, however, seem to have settled the points of contention as follows: The owner of a patent is, of course, entitled to a monopoly during the life of the patent,3 and the anti-trust laws do not in any way control or limit that right, either by declaring the monopoly void, in general, or by denying to the patentee or his assignee the right to sue for infringements of his patent rights, because he has entered into a combination to acquire and control all valuable patents, covering machines which relate to the same art or industry, even though that combination may be unlawful.4 But the mere fact, that the subject-matter of the monopolistic combination may be patent rights, covering machines employed in the same art or industry, will not protect the combination from the penal provisions of the anti-trust laws. If a corporation or association is formed among manufacturers and patentees of certain articles of kindred character, in order to control the trade and prices of such articles, the combination is nevertheless illegal, although the exclusive manufacture of the goods is guaranteed by letters-patent from the United States government.1 In the Harrow Company cases, cited in the note below, the manufacturers of spring-tooth harrows formed a combination, for the purpose of providing for the transfer to a central corporation of all the patents under which they were severally operating, each manufacturer receiving in the place of his patents an exclusive license to manufacture the particular kind of harrow which was covered by his patent. All agreed that the harrow should be sold at an uniform price, to be fixed by the combination. The Federal courts united with the New York courts in declaring this combination to be violative of the anti-trust laws.

Combinations of wholesale dealers,—for the purpose of compelling retail dealers to pay their bills, by the agreement that the members of the combination will refuse to sell to a retailer who has failed to pay his bills due to one of the combination,—are held to be lawful and not to come within the provisions of the anti-trust laws.2

So, also, has it been held to be lawful for retail dealers to enter into an agreement, not to deal with manufacturers who sell to consumers or other than regular dealers, at points where there is a regular retail dealer.3

The most curious judicial attempt to balance conflicting interests, and to do equity, under modern legislation regulating combinations in restraint of trade, is to be found in two recent cases in Pennsylvania. A statute of that State authorizes combinations of employees for the purpose of enforcing an increase of wages. Certain employers formed an association to resist these combinations of employees, one of whose by-laws prohibited members of the association from buying supplies from dealers, who sold to employers who had yielded to the demands of the association of employees. Inasmuch as the employees had resorted to artificial means to raise the price of labor, the association of employers was held to have been formed only to resist this artificial rise in wages, and not to lower them, as regulated by the law of supply and demand. The combination and agreement of the employers was held under those circumstances not to constitute an actionable conspiracy.1

Under the clauses of the anti-trust laws, which declare that where the mere purpose or motive of an otherwise lawful association, a corporation or partnership for example, is to monopolize a trade, the courts have held that no offense has been proved to have been committed, unless it be shown that the purpose of the association has been to monopolize the business throughout the country; and the mere fact, that the corporation or association has actually driven several competitors out of the business, does not prove the existence of an agreement or a purpose to monopolize the entire traffic.2 On the other hand, if the agreement to monopolize the entire traffic is proven, its successful accomplishment need not be established.3 Nor is it necessary that the business, which the combination is formed to control, should be actually established. As it was stated in one case, the statute does not distinguish between strangling a commerce which has been born, and preventing the birth of a commerce which does not exist.1

The anti-trust law of a State, of course, has a jurisdiction limited by the boundaries of that State. Hence, offenses, committed against the law outside of the State, are not punishable under the State law, in either the Federal or the State courts.2

Some of the anti-trust statutes expressly provide that the illegality of an association, partnership, corporation, or other combination, because it is in restraint of trade under the provisions of the statute, shall be a good defense to any suit by such combination against a third person, which may arise in the prosecution of the prohibited objects of such combination. And that provision of the anti-trust law has been held to be constitutional.3 But, in the absence of such an express provision, the illegality of the combination or association does not affect the legality of causes of action of the members of such a combination or association against third parties.4 Nor can a stockholder in an illegal trust defend himself against his liability on his contracts to such trust, by proving the illegality of the trust, even in a State where the statute authorizes such a defense in actions by an illegal trust against others; on the general ground that such a stockholder is a *particeps criminis*.5

One of the most fruitful sources of economic discontent is occasioned by the rapid development in the larger cities of the so-called department stores, wherein everything of a movable nature is offered for sale under one roof; dry goods, hardware, shoes, hats, clothing, groceries and other provisions, wines and liquors, drugs, jewelry, etc. By combining these many departments under one management, not only is the convenience of the customer promoted by being enabled to satisfy his or her needs in every direction in the one establishment, but he is able also in many cases to purchase at a less price than what would be charged for the same goods at the small retail specialist. The immense volume of the business of a department store enables goods to be sold at a smaller profit than what would be required to support the small retailer. The small retailer does not, however, view with unconcern this growth of department stores to his own ultimate extinction.

The Chicago City Council enacted an ordinance, which prohibited the sale of provisions and intoxicating liquors in stores in which dry goods, clothing or drugs are sold. The Supreme Court of the State has recently declared the ordinance to be an unconstitutional interference with the personal liberty of the citizen which is not justified by any considerations of the public health or morals.1

But it may yet be an open question still, whether a similar prohibition, enacted by the legislature in the plenitude of its police powers as revealed by the anti-trust laws, may not be sustained by the courts.

[Back to Table of Contents]

§ 114.

Labor Combinations—Trades Unions—Strikes.—

Like combinations of capital, all labor combinations having for their purpose the enhancement of the price of labor and the control of the terms of hiring, were at common law so far illegal as that the courts would not give their aid in enforcing the obligations of the member to obey the orders of the organization in a labor dispute, or in any other way to facilitate the purposes of the organization in the industrial warfare. But unlike combinations of capital, they were by special statutes, dating back to the reign of Edward VI., and reaching to the close of the eighteenth century, declared to be criminal conspiracies, and provision was made for the punishment of the members of the organizations.1 This discrimination against labor organizations, unjust as it was, is rationally and legally accounted for by the fact that other statutes regulated the terms of hiring in all kinds of trades; and, consequently, combinations of laborers, to raise wages or to secure advantages which were not provided for by statute, were really conspiracies against these statutes and the power of the government to control the labor contract. There was no such regulation of the terms of other contracts, and for that reason combinations of capital were not declared to be criminal conspiracies; although, at common law, combinations in unreasonable restraint of trade were so far held to be illegal, as to place them beyond judicial aid and sanction.

Ignoring the important fact, that the criminal character of the labor combination was based upon the express provisions of the statutes, which did not come down to the American people as a part of the common law, two early cases in Pennsylvania held the labor combination, formed for the purpose of controlling the rate of wages, to be a criminal conspiracy;2 while in two New York cases, the influence of the English cases on labor conspiracies led to the declaration by the court that the New York statute, defining criminal conspiracy to include combinations to commit any act injurious to trade or commerce, made a labor organization a criminal conspiracy, even where the members of the combination had only agreed upon the rate of wages which they would demand.1 These cases, however, have not become the law of this country, and they were speedily followed by other cases in Massachusetts, New York and Pennsylvania, which placed labor combinations upon a plane of legal equality with capitalistic combinations, by holding that it was not a criminal conspiracy for workmen to combine for the purpose of enhancing the rate of wages or for improving, in any other way, their relations with employers.2 In Carew *v.* Rutherford, the Supreme Court of Massachusetts said: “Every man has a right to determine what branch of business he will pursue, and to make his own contracts with whom he pleases, and on the best terms he can. He may change from one occupation to another, and pursue as many different occupations as he pleases, and competition in business is lawful. He may refuse to deal with any man or class of men; and it is no crime for any number of persons, without an unlawful object in view, to associate themselves together and agree that they will not work or deal with certain men or classes of men,

or work under a certain price or without certain conditions * * * Freedom is the policy of this country."[3]

It may be accepted, therefore, as the law of this country, independently of the effect of modern statutes, to which reference will be made shortly, that there is nothing criminal in trade or labor combinations, so far as they undertake to do no more than by combination to better their own condition, by dictating the terms of the contract of hiring for themselves. And in laying this down as the law of the land, the courts have merely secured to the workman the same liberty of contract, which the capitalist has enjoyed at the common law, and which in preceding pages and sections of this chapter has been declared to be the constitutional right of every man. We find in many of the States, notably, Massachusetts, Michigan, Maryland, Iowa, statutes which provide for the incorporation of trades unions and other labor organizations; and in all of them, one of the permissible objects of incorporation is declared to be the procurement of better terms of employment.[1]

Congress has also provided for the incorporation of national trades unions,[2] for the attainment of similar purposes.

Not only are labor organizations thus recognized; but because membership in one of them acquires a material value, through the possession of property, the establishment of aid funds, etc., the courts will inquire into the rightfulness of expulsion of a member from one of these organizations, and order his reinstatement, if his expulsion is found to be unwarranted by the rules of the organization; and they will award damages for loss of employment, or for any other injury which he may have suffered in consequence.[1]

A New York statute provides for the registration of labels of trade unions, and the punishment of those who make use of the label on goods which are not made by union labor. The labels are affixed to goods which are manufactured by union labor, so that purchasers, who are so minded, may discriminate in their purchases against the products of non-union labor. This statute was sustained as a lawful assistance to union labor, and it was held not to operate as an invalid discrimination against non-union labor.[2]

There are, however, statutes in most of the States, as well as an act of Congress, which expressly prohibit all combinations in restraint of trade. These statutes have been fully explained in a preceding section[3] in their bearing upon the combinations of capital in restraint of trade; and in that connection, it has been shown that all combinations to control prices and the terms of contract are by these statutes made criminal misdemeanors, and the combinations criminal conspiracies, it matters not how reasonable the regulations and purpose of the capitalistic combination may be, provided they do in fact restrain trade and competition. Unless there are qualified clauses in these statutes, excluding labor combinations from the operation of their provisions, the irresistible conclusion is that all labor combinations, in restraint of trade and competition, are prohibited by these anti-trust statutes, as much so as are the combinations of capital. The laborer, by joining a trade-union, undertakes by his entry into such a combination, to enhance the price of the commodity which he has to sell,

i. e., his labor. And by so doing, he restrains trade and competition, in violation of the anti-trust laws, as much as does the manufacturer of oil and sugar by the formation of a trust. The national anti-trust law has been held to apply to labor organizations in a number of cases, beginning with the celebrated Debs case,[1] and followed by a large number of cases. But it is difficult to determine how far most of the cases may be cited in support of the proposition, that a trades-union is necessarily a violation of the anti-trust law, as in most of the cases the parties have not confined themselves to an agreement, that they will insist upon certain terms of employment, but have proceeded by divers means to compel all others, not members of the union, who work at the same trade, to combine with them, in forcing the employers to accede to their demands. There are, however, a few cases, in which the issue is clearly met and settled, that the anti-trust laws prohibit alike labor and capitalistic combinations in restraint of trade. Thus in one case,[2] the Supreme Court of Illinois held an association of stenographers, which was formed "to establish and maintain uniform rates of charges and to prevent competition among its members was an illegal combination in restraint of trade, and refused to allow an action to be brought by one member against another for underbidding him in violation of the rules of the association. In another case,[3] the by-laws of a masons' and builders' association, the membership of which included six-sevenths of the contractors of a city, which required the members to first submit all bids made by them to the association and the lowest bidder to add six per cent to his estimate, before he submitted his bid to the owner or architect, and to pay to the association the added six per cent, were unlawful contracts in restraint of trade, and were void. On the other hand, it has been held in Oregon,[1] that where a trades union seeks by fair means to compel an employer to obey a reasonable rule of the union, the union is not engaged in the creation of a monopoly, in violation of the anti-trust laws.

In a few of the States, there are special statutes, which expressly authorize workmen to combine "for the purpose of obtaining an advance in the rate of wages or compensation or of maintaining such rate" (New York statute) and declare that such a combination is not a conspiracy. Such laws are to be found in New York, Pennsylvania, New Jersey and Colorado.[2]

The New Jersey statute was held to authorize and to make lawful a combination of workmen to secure the control of the work connected with their trade by any peaceable means. And the court declared that equity would not enjoin such a combination, on the ground that it was detrimental to trade or injurious to individual business.[3] The statutes, heretofore referred to, which authorize the incorporation of labor organizations for the purpose of controlling wages and the terms of the labor contract, would probably be sustained as exceptions to the anti-trust laws, which prohibit similar combinations among capitalists; so that in those States, a labor organization, duly incorporated, would not be an unlawful combination in restraint of trade, even though it were large enough to completely control the price of labor and the terms of hiring in a particular trade or occupation, as some of the labor organizations are; for example, the locomotive engineers.[1] But, after the reader has carefully considered the numerous cases, cited and explained in preceding sections, which pronounce unconstitutional, because they are special or deny to all of the same class the equal protection of the laws, all laws which discriminate in favor of some

and against others, would have no difficulty in framing an argument to prove that the anti-trust laws, taken in conjunction with the statutory exemption of labor organizations from the restrictions of those laws, are an unconstitutional discrimination against the capitalist and an unauthorized favoring of the laboring classes in the industrial warfare.2 But this legislation is an undoubted, and, from the practical standpoint, probably unassailable determination of the State to diminish the natural inequalities of capital and labor, by prohibiting combinations of capital and permitting combinations of labor. When one considers this matter, apart from the fiction of equality of all men before the law, and from the technical rules of constitutional law which rest upon that fiction, it does not seem unreasonable to make this discrimination, while the liberty of contract of both parties is protected from infringement or restriction by controlling legislation. The individual laborer is completely at the mercy of the employer, if he cannot combine with his fellows to maintain a standard of wages and to control the terms of the labor contract in other matters. Even then, is there no real equality of conditions between the employer and the employee. The individual employer, who is prohibited from combining, has through his control of the materials of production and the immediate necessities of the workmen the advantage over the members of the labor organization, from whom he selects his employees. The thorough-going individualist would, of course, condemn any restrictions upon voluntary combinations of either capital or labor, and the constitutional requirements of uniformity of laws for all men and the equality of all men before the law, sustain him in this contention.

Granted, that labor organizations are lawful combinations in restraint of trade, when they are formed for the purpose of controlling the price of labor, there is no illegality in the simple act of striking. A body of workmen, belonging to the same union, and employed in the same industry, have an undoubted right to strike, i. e., to leave the situations which they have held, if the employer refuses to agree to their terms of employment. Where the individual workman does this, his action is unquestionably lawful, if he acts in a thoroughly peaceable manner; and no law could deny him this right, without violating the constitutional principle of liberty of contract, unless he has been engaged to serve for a definite period of time, and he proposes to abandon his work before the expiration of the term of service. In a preceding section1 it has been explained that there is no legal difficulty in the way of enjoining the specific performance of a labor contract, except in those cases in which the work called for by the contract required unusual skill; which, of course, could not be commanded by an injunction. But even in such a case, equity has frequently compelled indirectly the performance of the contract for work, by enjoining the “striking” artist, singer, etc., from fulfilling any other engagement during the period of the broken contract of service. A strike without cause during the period of hiring, where the contract stipulates the period of hiring, is undoubtedly unlawful, whether it is done by an individual workman or by a combination of workmen, acting in unison.

But in its application to most labor disputes and to most strikes of workmen, this distinction between definite and indefinite periods of service is almost an academic question, for the reason that it rarely happens that workmen are employed for a definite period of time. The labor contract is almost invariably a hiring from day to day; and if the contract does not expressly or by provision of law require a notice to

quit, either party to it may terminate the contractual relation at the close of any day without any notice whatever. And, whenever labor combinations for regulating the terms of the contract of hiring are held to be lawful and not in contravention of the anti-trust or other prohibitive laws, a strike by a body of workmen in unison would be as lawful as is the same act by an individual workman, as long as the abandonment of the work was made for the purpose of securing better terms, and was not accompanied by acts of lawlessness, disorder or violence.1

But experience has taught the workmen that in the great majority of labor disputes, a peaceable withdrawal from work of even the whole body of workmen, without the use of means to prevent others from taking their places, fails utterly to accomplish the end they have in view, viz.: to force the employer to agree to the terms of employment which are demanded by the labor combination. The strikers, therefore, feel the need of resorting to various methods of consolidating the whole body of workmen against the employer or employers, which unquestionably in most cases obstruct the business of others, including the employers and the would-be employees, who are willing to work on the terms, which are proposed by the employers. Even if the strikers do not resort to acts of violence against the persons and property of employers, and against the workmen who are willing to take the places of the strikers,—and violence is the usual accompaniment of almost every extensive strike—they attempt to persuade others from engaging in work, and threaten them with all sorts of dangers, while they visit contumely upon them by calling them "scabs," and by the use toward them of other opprobrious epithets. To secure their end, strikers are in the habit of stationing men—picketing or patrolling it is called,—in the neighborhood of the works or places of business of the employers, whose duty is thus to persuade and prevent by these different means other workmen from taking the places which they have themselves abandoned. These acts are so much akin to boycotting, that their legal character will be discussed in the next section in connection with the subject of boycotting.

But this is an appropriate place for the consideration of the law of conspiracy as it bears upon the question of the constitutional rights of workmen in the industrial warfare.

The long established definition of conspiracy, which is illegal and which is actionable civilly or may be punished criminally, is a combination of two or more persons to do an act unlawful in itself, or to do a lawful act by unlawful means. Under the old law of conspiracy, as indicated by this definition, it is not possible for one to conceive of any act of conspiracy, which would not be equally reprehensible, if done by a single individual. An individual cannot do a lawful act by unlawful means, any more than can a combination of two or more persons. But the ever growing disposition of persons, particularly in the prosecution of the modern industrial warfare, to combine their economic forces, in order to restrain another's liberty of action, by means which were in themselves not unlawful, and to secure the doing of an act, which in itself is likewise lawful, revealed to the juristic mind the possibility of securing by combination an end, which was held to be against public policy, viz.: an undue restraint of trade and competition, without doing an unlawful act, or employing unlawful means in doing a lawful act. It became apparent, therefore, that the definition of conspiracy had to be enlarged, in order to include combinations, to do

lawful acts by lawful means, where the motive or intent is unlawful. This enlargement of the scope of criminal conspiracy is not peculiar to labor disputes; but we are in this connection only concerned with its application to the subject under inquiry. It is not a criminal conspiracy, independently of modern statutes, for people, either as employers or employees, to combine their economic forces, in order to gain an economic advantage over their antagonists. That seems to be guaranteed to them, and to workmen in particular by modern statutes, provided they do not do any unlawful act, or a lawful act by unlawful means. But in several cases, the courts seemed to hold that, if the strike, ordered by the union or labor organization, be so conducted as to maliciously cripple the employers' business, the combination would thereby become a criminal conspiracy, even though no unlawful act be done and no unlawful means be employed.1 In the Nebraska case, certain tailors agreed to strike on a certain day, and to return all work unfinished which had been cut out for them and given to them. The court found that the tailors were actuated by a malicious motive to injure the employer, and he was awarded damages for the malicious conspiracy. The other two cases grew out of the strike of the employees of the Northern Pacific Railroad. The railroad was at the time in the hands of a receiver. The receiver, Oakes, secured an injunction, against Arthur, the chief of the Brotherhood of Locomotive Engineers, and others, restraining them from combining to intimidate or advise employees of the railroad to strike in such a way as to cripple the business of the railroad. In the Circuit Court of Appeals, the injunction was changed so as to permit combinations to strike, and advising others to join with them, but restrained the use of intimidation, as well as the gratification of the malicious desire to cripple the business of the railroad. These railroad cases are complicated by the following facts: (1) That the railroad business is a business "affected with a public interest;" which rather places striking employees in the attitude of attacking the public interests, as well as the interests and property of the railroad, their employer; (2) that the railroad was engaged in interstate commerce, and hence the provisions of the interstate commerce act applied to and controlled the case, and (3) that the railroad was at the time in the hands of a receiver, an officer of the court, who was conducting the business of the railroad under the orders of the court, so that the combinations of strikers might have been treated as conspirators against the mandates of the court. But these facts do not seem to account for the declaration of the court that a combination, formed for the purpose of maliciously seeking to do injury to the business of an employer, is an unlawful conspiracy, even though the means employed were lawful. We must except these and the Nebraska cases, as authorities for this proposition as a general rule of the law of conspiracy.

One can understand how strikers may be guilty of a criminal conspiracy, because they have no satisfactory and just reason for striking, and only strike in order to gratify their malicious feelings towards the employer. But if the employees actually or professedly strike, in order to obtain an increase of wages for themselves or to better the terms and conditions of their employment, which they professedly have a right to do, the combination strike is not converted into an unlawful conspiracy, because in their effort to win their battle the workmen display a venomous or malicious desire, and endeavor, to cripple the employer's business, as long as they do not do acts and employ means, which are in themselves unlawful. The intent to cripple the employer's business is necessary to a successful strike. If the employees, who are dissatisfied with the terms of employment, give their employers ample notice of their intention, so

that he may secure others to take their places, or select a time for striking when business is slack and the employer's business will not be seriously incommoded thereby; it would be folly for them to expect success. In no kind of warfare, industrial or otherwise, is a general expected to give the warnings and notices, which the code of honor required in the duel. If the conditions of the antagonists in the economic warfare,—and that labor disputes do constitute acts of war, no one can reasonably deny—were equalized, as the duellists tried to do in the past, there may be some reason for requiring that the strikers show some consideration for the interests and the business of the employer. In view of the gross inequalities of the contestants, it is certainly not equitable to require such altruistic conduct on the part of striking employees. Nor would I consider a law to observe the constitutional guaranty of liberty, which would make in the case of employments of a strictly private character, a criminal or actionable conspiracy out of a combination of workmen to strike—where the motive was a lawful one, for example, to increase their wages, and the means employed were of a lawful character—simply because in conducting the strike they were actuated by a malicious or wilful intent to do injury to the business of the employer. As it was stated in the leading English case:1 "Of the general proposition, that certain kinds of conduct not criminal in any one individual may become criminal if done by combination among several, there can be no doubt. The distinction is based on sound reason, for a combination may make oppressive or dangerous that which, if it proceeded only from a single person, would be otherwise, and the very fact of the combination may show that *the object is simply to do harm, and not to exercise one's own just rights.* In the application of this undoubted principle it is necessary to be very careful not to press the doctrine of illegal conspiracy beyond that which is necessary for the protection of individuals or of the public; and it may be observed in passing that *as a rule it is the damage wrongfully done and not the conspiracy* that is the gist of actions on the case for conspiracy. * * * But what is the definition of an illegal combination? It is an agreement by one or more to do an unlawful act or to do a lawful act by unlawful means. * * * Have the defendants combined to do an unlawful act? Have they combined to do a lawful act by unlawful means? * * * The unlawful act agreed to, if any, by the defendants must have been the intentional doing of some act to the detriment of the plaintiff's business *without just cause and excuse.* * * * The truth is that the combination of capital [or labor] for purposes of trade and competition is a very different thing from such a combination of several persons against one, with a view to harm him, as falls under the head of an indictable conspiracy. *There is no just cause or excuse in the latter class of cases. There is such a just cause or excuse in the former.* There are cases in which the very fact of a combination is evidence of a design to do that which is hurtful without just cause—is evidence—to use a technical expression—of malice. But it is perfectly legitimate, as it seems to me, to combine capital [or labor] for the mere purposes of trade, for which capital [or labor] may, apart from combination, be legitimately used in trade."1

But I think a sound and reasonable distinction can and should be made in this connection between the strikes, which occur in businesses of a strictly private character, and those which occur among the employees of a railroad, or of any other employer, whose business is "affected with a public interest." If the cloak-makers of New York should go out on a strike against their employers, in order to secure better wages or shorter hours, even though the strike should be willfully begun at a time

when the long continuance of the strike would work the greatest injury to the business of the employers, there is no consequent disturbance in general of the business and commerce of the city, so as to work injury to any one but the parties who are immediately concerned in the labor dispute. The general business of the city is in no way obstructed by the strike. But if the employees of an extensive railroad system, or of the street railways of a city, should strike, and they select the time of the year, when they could do irreparable injury, not only to the railroad companies, but likewise to the great public who rely upon these railroads or street railways for transportation of themselves or their goods, in the prosecution of business and commerce; a new element of injury has entered into the case, which is not to be found in the case of a strike of workmen engaged in a strictly private business. The widespread interests of the public in general are jeopardized by the persistence of a general strike of the railroad employees. If the railroad business is so far a business affected with a public interest, as that the State may interfere with the liberty of contract of the railroad, and establish a maximum charge for its services to its patrons—and of this proposition there can now be no doubt[1] —then the contractual relation of the railroad or street railway with its employees, is sufficiently affected with a public interest to justify State regulation of the terms of service of such employees; and in the absence of such a regulation, to treat the employees as quasi-public officials, and to compel them, in their disputes with the railroads, to observe a reasonable regard for the public interests.

[Back to Table of Contents]

§ 115.

Strikes, Continued, And Boycotts.—

In the preceding section, I intended to consider the legal right and status of only those combinations of workmen, which are composed altogether of the striking workmen, and to leave for the present section the consideration of strikes, which are conducted or participated in by others than those who are the striking workmen. There is an important legal distinction between the two forms of strikes and labor combinations. To illustrate: The employees of a particular railroad system agree among themselves and without any co-operation with others, who are not in the same employment, that they will strike, unless the railroad authorities increase their wages or comply with the workmen's demands for a change in any other of the terms of hiring. In such a supposable case, only two legal questions are involved: *first,* Have these employees of the same employer the right to combine to force the employer to the acceptance of their terms of contract? *secondly,* What means may they employ in bringing the employer to their terms? But this is not the common and prevalent form of labor combinations. Workmen of all trades do not combine against one particular employer. The workmen of a particular trade combine for their mutual protection against all employers in that trade. They form organizations, which include in their membership the employees of many different employers. The officers of the organization undertake to interview the employers of members of the union, and to lay down to them the terms of employment upon which alone the members of the union in their employ, or who are about to enter into their employ, will work for them. The walking delegate of the union threatens to call the employees from their work and to order them to strike, unless the terms which he dictates to the employer are complied with. And the military discipline of the trade union and other labor organizations, is most strikingly demonstrated by the prompt obedience which the individual workman renders to the walking delegate's orders to stop work. They drop their tools as promptly as they do every day when they hear the dinner bell. It is a matter of no wonder that the employer indignantly resents the presence in his workshops of a person who bears to him no legal relation whatever, and who yet assumes to tell him what kind of a contract he shall make with his individual employees, under penalty of ordering a strike of the employees. And when the strike is ordered, the officers of the labor organization conduct and manage it, and it is with them that the employer must negotiate for a return of his men to work. We have, therefore, in every strike, an interference by an outsider with the contractual relations of two other persons. And the main legal questions in every labor dispute, which, however, are frequently very obscurely treated by the courts, are: *first,* under what circumstances can a third person interfere with the contractual relations of two others? And, *secondly,* what is the legal effect of such an interference when made, not by one outsider, but by a combination which is composed partly of outsiders and partly of one of the parties to the contract? And, *thirdly,* what means may be employed by the outside combination to enforce the compliance of the opposing party to the contract with the terms demanded by the combination? These questions, when put in this general form, reveal the almost

complete identity of the legal rights of all combinations, whether they are of capitalists or workmen. What would be the judgment of the courts, in a case in which an association of employers was charged with having tried to force another employer, whether he was or was not a member of the association, to make certain labor contracts which the association had ordered, and which called for a reduction of the wages which the opposing employer was paying to his employees, or for an increase of the hours of work? Would the courts, on the petition of one of the workmen of the latter employer, give judgment for damages to such workman against the association of employers, if they were to employ any other means than moral suasion to enforce on all employers obedience to the orders of the association? No authority can be cited in direct support of either the affirmative or negative answer to these questions, because employers have not so far felt the necessity of combining to protect themselves against the exactions of combinations of workmen. But analogy will enable us to cite as such authority the law, heretofore presented, which determined how far combinations of capital are lawful in their attempt to control the price to the consumer of their several products of manufacture, or the value of services or goods to those who need them.1 In the same way that combinations of capital have been forced to incorporate, as the sole means of escaping the hostile legislation, so prevalent in this country, so would the labor combinations feel the need of corporate powers, if the law of conspiracy was as clearly laid down and applied to them as it is against the combinations of capital. If the labor in a particular trade for a particular territory were incorporated; and the employer had to make his contracts of hiring with the incorporated labor organization, no law would be violated in such a case. The labor corporation would fix its price and the terms upon which alone the employer could get the required labor; in the same way, and as lawfully as that the American Sugar Refining Company, or any one of the other incorporated trusts, determines the price at which their respective commodities shall be sold to the consumer. The contract for labor would in that case be made, not with the individual workmen, but with the labor corporation. It is also equally lawful for the trades-unions, as voluntary associations, under the law of partnerships, to make such contracts for labor with employers. Only when the labor contracts are made by the labor organizations, instead of by the individual workmen, can these organizations undertake the control of labor without being charged with an interference with the contractual relations of other parties. Inasmuch as most, if not all, of the labor contracts are made by the individual workmen; and the labor organizations, of which they are members, participate, if they do so at all, in the making of the labor contracts, only so far as to have a preliminary general understanding with the employer as to the terms and conditions of the proposed labor contracts, and do not actually make the contracts for the individual workmen, the union is not in any proper sense a party to the labor contract. Any attempt of the union, in such a case, even to enforce the preliminary agreement as to the terms and conditions of the employment, constitutes an interference with the performance of a contract, to which it is not a party. The legal character of most strikes, therefore, depends upon the determination of the right of a single individual, or of a number of individuals in combination, to interfere in the contractual relations of other parties.

Starting out with the general proposition of law, which has been explained and applied in preceding sections, and which is still, at least in part, the law of this

country, viz.: that what one man may do singly, a number of men in combination may likewise do, at least in the pursuit of a just or lawful end; it is necessary to first determine when one man alone may lawfully disturb or destroy the contractual relations of others by the employment of lawful means. If a single laborer, who is employed for an indefinite period of time, becomes dissatisfied with the work or with the terms of employment, he has a right to abandon his situation at any time and without any notice whatever to the employer, unless the law controlling such employment requires such a notice to be given. And it would seem that a third person may lawfully advise him to seek other employment, aid him in procuring other work, and give him financial assistance while he is seeking another situation. This is what every considerate father does for his sons, and which is commonly done by friends for each other. There is undoubtedly no illegality, either of the employee, in quitting his employment in such a case, or of the father or friend in advising or aiding the employee in quitting his present position and seeking a more profitable position. Authorities are not needed in support of this proposition. But if the employee is working under a contract of hiring for a definite period of time, his abandonment of his position before the expiration of the contractual period of service is an unlawful act, because it is a breach of a contract for which the employee can be held liable in damages; and in some of the Southern States' statutes, the breach of some of such contracts is made a criminal misdemeanor.1

Is it lawful for a third person to advise and aid an employee in breaking his contract, whether it is lawful or unlawful for the employee to break it? It is presumably true that if the third person was actuated only by friendly interest in the employee, and not by a malicious desire to injure the employer, no liability would attach to the third person for his interference as long as he limits his interference to persuasion, financial aid and efforts to secure for the employee a more desirable position. At least no authority to the contrary has come to my notice. But if the third person is actuated by a malicious desire to injure the employer, and his relations with the employee are not such as to support the presumption that the moving cause of his interference with the contractual relation of employer and employee was his friendly interest in the latter, then he is held to be liable in damages at common law by some of the cases both American and English.2 But in the United States, the cases are more numerous, which deny the right of action against a third person, who induces one to break his existing contract or to refrain from entering into any future contract. These cases hold very generally that the malicious motive of such a third person does not make his interference an actionable wrong, unless he employs unlawful means, such as deceit, misrepresentations, intimidation or duress.1

I have in the two preceding notes given a somewhat detailed statement of the cases, in which the attempt was made to hold a third person liable for a malicious interference with the contractual relations of others, because I believed it to be necessary for the support of my future criticism of the decisions in relation to strikes and boycotts. In studying these cases, one must bear in mind that some of them, which recognize the right of action for a malicious interference by one person in the contractual relations of others, are cases of enticement of domestic or menial servants from service, which under English statutes, and by statutes in some of the United States, are made actionable wrongs. When we eliminate these cases, we find that the undoubted trend

of judicial opinion in this country is against the recognition of any legal liability, either civil or criminal, for any interference with the contractual relations of others, unless unlawful means are employed in effecting the interference. And the criticism of the English cases in the recent case of Allen *v.* Flood,[1] would seem to prove a similar condition of the law in England.

That the employment of unlawful means, such as deceit, misrepresentation, intimidation, or duress, in effecting a successful interference with the contractual rights and liberty of others, would be an actionable wrong, does not admit of any doubt.[1]

We are now prepared for the answer to the question, whether a combination or conspiracy to interfere with the contractual relations of others is an actionable wrong, where no unlawful means are employed to secure that end, and where the motive of the interference is the promotion of the economic welfare of the parties interfering. This legal proposition is involved in every case of industrial boycott, and of every strike which is conducted in whole or in part by persons who are not striking employees.

Assuming that the law of conspiracy has been correctly stated, as including only cases in which the parties conspire to do an unlawful act, or to do a lawful act by unlawful means, the conclusion is irresistible that no strike or boycott is unlawful or actionable, unless unlawful means are employed, such as deceit, misrepresentation, intimidation, or threats of injury.

It seems to be settled that a trade union or labor organization is justified by law in ordering a strike of a part of its members, when their employer refuses to accept the terms of employment which are exacted by the union. Cases and statutes which are cited in the preceding section[2] fully sustain this proposition. But sympathetic strikes, *i. e.,* strikes by other bodies of workmen, in order to compel the unmanageable employer to come to terms, are unlawful, if boycotts are illegal. Indeed, they are nothing more than boycotts.

An historical explanation of the origin of the term “boycott” is not out of place in this connection, and it will serve to explain the fundamental reasoning of the cases on boycotting. The term, as describing a method of industrial warfare, arose during the Irish land troubles of the early eighties, in consequence of the manifesto of the Irish land league, that the payment of rents would be refused, if they were not reduced to what were claimed by the league to be reasonable amounts. During the disturbances which followed the attempt to give effect to the manifesto, the peasants came into conflict with a landlord of the name of Boycott. He had been known to be especially severe in making terms with his tenants; and when he refused to accede to the demands of the league and evicted his tenants for refusing to pay rent, almost the entire population of that community combined to force him to make terms with the league. The bakers, butchers and other tradesmen refused to have dealings with him. He could buy nothing wherewith to feed his family; all his domestic servants left him, and he could get none to take their places. He and his family were left alone in the midst of a more or less populous community, shunned as if they were lepers or

criminals. Existence under such circumstances became unbearable, and he was forced to yield.1

Now, in the original boycott cases, as it has been in almost every other extensive case since then, both in England and America, the combination or conspiracy has been attended with violence and injury to, or trespasses upon the property and personal rights of those against whom the boycott was directed. In the celebrated case of the Queen *v.* Parnell, just cited, forcible possession or retention of the farms was a part of their plan of campaign, while the tenants refused to perform their own obligations under the leases. These boycotts were therefore conspiracies to do unlawful acts. But where the boycott is unaccompanied by infringements of the criminal law, as it is enforced against a single individual, or by clear trespasses upon the rights of others, it may be defined as a combination of persons to force one to terms by abstaining from having business and other relations with him. And in order that the boycott may be made more effective in its operations against one person, the participants in the combination usually threaten to boycott all persons who may dare to have relations of any kind with the objectionable person or persons. Such a combination differs in legal character from the capitalistic combinations only in the degree of danger that the procedures of the former will be accompanied by violence and disorder and by distinct trespasses upon the rights of others. Both kinds of combinations are engaged in an industrial war, and both are actuated by the same motive, viz.: the procurement of better prices for the commodities, which they have to sell; the commodity of the workmen being their labor. So far as the managers of a boycott are able to keep themselves and their co-conspirators from interfering with the legal rights of persons or of property of those who are boycotted, their actions in combination are actions which are thoroughly lawful, if they were done by individuals acting alone. If the boycott is unlawful, it must be so, only because the individuals are not allowed to do in concert what they are allowed to do singly. In previous sections of this chapter1 it has been declared, with a sufficiency of authority in support of the general proposition, to be the constitutional right of every American citizen to refuse to have business and social relations with any one who may displease him, and his motives for abstaining from associating with the objectionable person cannot be inquired into. And the cases, heretofore explained in the present section, demonstrate that the law in most of the United States does not recognize even a malicious interference with the contractual relations of others, when done by a single individual. It is conceded that conspiracy differs from other wrongful acts in that the malicious intent to harm another, by doing acts in themselves lawful, may make proof of an actionable conspiracy. But, in its application to the combinations of capitalists, it has been clearly set forth in preceding sections1 that a willful intent to do injury to others, does not make acts in themselves lawful, an unlawful conspiracy, when done in concert, where they are prompted by a just purpose, for example, the promotion of the material welfare of the actors. The cases, generally, sustain the right of labor combinations to order a strike of its members, when the employer refuses to accede to the terms of employment which are demanded of them.2 But the cases, which will be fully stated subsequently, in the main deny that the industrial purpose, viz., the promotion of the material welfare of the laboring class, justifies the conspiracy which is known as the boycott, even when nothing has been done by the boycotters, which would be unlawful as the act of a solitary individual. So far as these cases lay this down as the

law relating to boycotting, they establish a different rule of conspiracy for the control of the actions of labor combinations, than what is applied to capitalistic combinations. Such a discrimination is clearly unconstitutional, in that it refuses to one class of citizens the equal protection of the laws, by establishing for the control of the actions of that class a more stringent law of actionable conspiracy than what is enforced against others.

This criticism must, of course, be considered, as if the anti-trust laws had not been enacted, and that monopolistic combinations of capital had not been made unlawful by these statutes. With these statutes in force against capitalistic combinations, and not equally enforced against labor combinations, as has been explained in the preceding section; the law of conspiracy, as it has been developed and applied against labor organizations and workmen in the boycott cases may be reasonably considered as a rough attempt at securing to all the equal protection of the laws. And I do not desire to be understood in my criticism as intending to do more than to secure as far as possible a rigid adherence to the individualistic principle of the liberty of all, in the industral warfare,—which is now being waged, year by year with greater intensity,—to do anything which does not constitute a trespass upon the rights of others, as long as the motive of the act, which may be injurious to others, is the promotion of the material welfare of the actors. It may be constitutional to prohibit all combinations in restraint of trade, and make the forming of one an actionable wrong, even though the motive be reasonable, as it has been held by the Supreme Court of the United States in the case of the Joint Traffic Association[1] and by the New York Court of Appeals in another case;[2] but the nearly equal division of the former court on that question would incline one to consider it as still unsettled. But it certainly cannot be declared to be in conformity with the constitutional requirement of equality of all men before the law, to prohibit all combinations of capital or of employers, and to permit combinations of labor. If it is constitutional to punish laborers, who combine for their material success in the industrial relations of life, if in their recognition of the solidarity of the interests of all workmen, they undertake to secure a combination of all of them, in separate trade-unions, according to trades, or in one large association of labor, including all the workmen in all the related trades; and, in order to force all the workmen to co-operate with them by joining the labor union, and subjecting themselves to the rules and regulations of the union, they forbid union men to work where non-union men are employed; then surely it is not constitutional to permit a combination of traders to force to the wall, by the use of their economic power, a trader who does not come within the combination. The same purpose actuates the members of both kinds of combinations and the acts of both are either lawful or unlawful, according as it is finally determined, whether voluntary, *i. e.* unincoporated, industrial combinations may or may not be suppressed, without violating the constitutionally guaranteed liberty of contract.

In a number of the States, statutes have been enacted, which prohibit boycotting expressly, and, in some cases, very drastically. In those States, boycotting is a statutory offense, and need not be proven to be a common law conspiracy. An enumeration of the States, in which such statutes are to be found, is not necessary to the present inquiry. They all substantially prohibit boycotting, as it has been defined above. They make any interference with the contractual relations of others by a

combination or organization an actionable wrong, it matters not what was the motive, or what the means employed. A statement of the cases on boycotting will now be given.

The preceding discussion makes it evident that a boycott, which is accompanied by any kind of violence and the obstruction of the prosecution of the business of the person who is boycotted, would undoubtedly subject the individuals engaged therein to legal liability. For such acts are unlawful, whether they are committed by one or by many.1 Of these cases, that of the People *v.* Wilzig, will serve best as an illustration. In order principally to enforce the employment of union musicians and waiters and the dismissal of non-union men, at the well-known saloon and music hall of Mr. Theiss on East Fourteenth street in New York City, the Knights of Labor and Central Labor Union, ordered a boycott of the place, and in consequence a body of men walked up and down in front of the saloon, with placards and signs, announcing that Theiss was an enemy of union labor and warning everybody to stay away from his saloon. These placards and notices were signed by "The Boycott Committee of the Central Labor Union." For fifteen days a crowd of over five hundred people obstructed the ingress and egress to this saloon. The boycotters succeeded finally in making Theiss yield to their demands and to pay them a large sum of money to cover the expenses of the boycott. It is manifest that such disorder and extortion are in violation of the law, irrespective of the element of combination, and the defendant was justly punished. These union men were clearly undertaking, by unlawful means, to compel Theiss' submission to their demands. Somewhat akin to actual violence or disorder, or obstruction of the business of the objectionable person, are the cases in which in the place of positive acts of that unlawful kind, are threats of violence and of obstruction to the prosecution of one's business.1 In Murdock *v.* Walker, the court issued an injunction against employees who had been discharged, restraining them "from gathering about the plaintiff's place of business, and from following his employees to and from work, and gathering about their boarding places, and from any and all manner of threats, intimidation, ridicule and nuisance." In the somewhat celebrated case of Sherry *v.* Perkins, in the course of a strike, a laster's union, composed in part of the striking employees, paraded up and down in front of the plaintiff's works, carrying banners with the announcement: "Lasters are requested to keep away from P. P. Sherry's. Per order L. P. U." The presence of a large number of striking workmen, carrying such a banner, was undoubtedly such a show of force as to justify the court in declaring it to be the equivalent of a threat of physical violence, which was sufficient to prevent other workmen from applying for the places which had been vacated by the strikers. It was therefore intimidation to the non-union workmen and obstruction to the prosecution of the plaintiff's business. Such a show of force in such a cause would have been just as unlawful if done by one individual. The parading of one powerful giant, carrying such a banner because he had been discharged from the plaintiff's employ, might have had the effect of obstructing the plaintiff's business, and would have brought the giant within the clutches of the law. In Vegelahn *v.* Guntner, a divided court held that a patrol of two men in front of plaintiff's business, who were giving to all workmen notice of the strike and persuading them not to enter into the plaintiff's employ, was an unlawful intimidation. The court said: "Intimidation is not limited to threats of violence or of physical injury to person or property. It has a broader signification and there also may be a moral

intimidation, like those which were found to exist in Sherry *v.* Perkins." The dissenting judges, Mr. Chief Justice Field and Mr. Justice Holmes, held that the patrol of two men carried no threat of violence, and simple persuasion not to enter into plaintiff's employ was a lawful means of carrying on the industrial competition between the employer and employee. But in that opinion, Mr. Justice Holmes holds that combined persuasion may be actionable. He says: "I agree, whatever may be the law in the case of a single defendant (Rice *v.* Albee, 164 Mass. 88), that when a plaintiff proves that several persons have conspired to injure his business, and have done acts producing that effect, he shows temporal damage and a cause of action, unless the facts disclose, or the defendant proves, some ground of excuse or justification. And I take it to be settled, and rightly settled, that doing that damage by combined persuasion is actionable, as well as doing it by falsehood or by force." He evidently accepts the definition of conspiracy of the English courts, as laid down in Mogul S. S. Co. *v.* McGregor.[1]

The phrase, "boycott," on account of the common accompaniment of violence, has come to mean, in the minds of many, the infliction of bodily injury, the forcible obstruction of business, or destruction of property, or one or more of these unlawful acts. Hence in Brace *v.* Evans, it was declared that "the use of the word boycott is in itself a threat." In that case, the strikers, carrying placards with the words, "Boycott Brace Brothers," followed the plaintiffs' wagons, and, having thus ascertained plaintiffs' customers, visited them and endeavored to persuade them from having business with the plaintiffs. This case corresponds in legal character with that of Sherry *v.* Perkins.

In another class of cases, the strikers indulge in the use of abusive epithets towards those who seek business relations with the boycotted person, or publish and distribute cards and circulars, notifying everyone of the boycott, and requesting all friends of union labor to abstain from dealing with the person boycotted. These actions have been repeatedly held to be unlawful actions, when it is the work of an organization.[1]

The case of Barr *v.* Essex Trades Council displays in a most striking form the great possibilities of the boycott, as a weapon of industrial warfare, when the boycotters are both numerous and united. A more or less detailed statement of the facts of this case will prove profitable. The suit for injunction was brought by the proprietor and publisher of a newspaper in Newark, New Jersey, against eighteen labor unions which were associated together, under the control of a central body, which was known as the Essex Trades Council, and which was composed of delegates from the component labor unions. If the members of any one of these unions had a labor dispute with any employer, and the employer refused to accede to the demands of the labor union, a report of the dispute was made to the council, and the council made it the common cause of all the associated unions. The council also issued cards, to be displayed in the shop windows of all dealers, who were reported as friends of organized labor, announcing that fact, and recommending the dealer to the patronage of all union workmen. In order to secure the patronage of the unions, the tradesman had to enter into an agreement with the council that he would keep for sale, as far as possible, only those goods which were declared by one of the unions to be "fair," and he entered into a similar agreement not to engage laborers who were not approved by the unions.

Those dealers, who were not favorably reported upon by a labor union within two months, were at once placed under the condemnation of the council, which practically amounted to a boycott. To enable the control of the tradesmen to become more effective, the council published in pamphlet form what they called "The Fair List of Newark, N. J.," which contained the names of all those who were approved of by the council as worthy of the patronage of workmen. In that list were to be found the names of business and professional men, covering almost every business and profession. Outside of the original Irish combination against Captain Boycott, there probably has never been a more extensive and more carefully thought-out plan for the control of those with whom laboring men have to deal. If such an union of workmen in a city the size of Newark could have relied upon the loyalty of all its members, and upon the intelligence, administrative ability and fair-mindedness of its officers, the ordinary and usual economic superiority of capitalists and employers in the industrial strife would have been removed. Apart from the agreement, which they exacted from tradesmen whom the council favored, not to purchase goods or employ labor, which were under the ban of the council, it would be difficult to find in this statement any element, which is properly characterized as an actionable wrong. And yet it was a boycott of all those, who did not comply with the demands of the Trades Council.

The plaintiff had fallen under the condemnation of the typographical union, which belonged to the Trades Council, because he purchased "plate matter" in New York for use in the printing of his paper, in opposition to the wishes of the union, to which all his employees belonged. He refused to comply with the demands of the union to give up the use of this "plate matter," which were stereotype plates; whereupon the union reported the dispute to the council, and the latter body declared a boycott against the newspaper, and issued and distributed throughout the city of Newark, a circular which read as follows: "Friends, one and all! Leave this council-boycotting Newark Times alone. Cease buying it! Cease handling it! Cease advertising in it! Keep the money of fair men moving only among fair men. Boycott the boycotter of organized fair labor." The court held this to be an unlawful combination, and that, although there was neither disorder, violence, nor threats of violence, the intimidation or duress of the plaintiff, caused by his fear of the loss of his business, made the boycott an actionable conspiracy.

Similar conclusions were reached in a number of cases where there was no other wrongful element than the threat of injury to the business of another, if he did not break off business relations with some other person who had incurred the displeasure or hostility of the striking workmen.[1] The sympathetic strikes of the employees of one railroad, because they handle the freight or the cars of another railroads, whose employees are on a strike, are of the same character and they have all been held to be actionable conspiracies.[2]

Two recent cases illustrate in a very interesting way the sweeping character of the American cases on this subject. In one case[3] a liverymen's association prohibited its members from doing business with any person who did not patronize its members exclusively. The association was held to have violated the law of conspiracy as well as the law argainst monopolies.[4]

The greater number of actionable conspiracies, assuming more or less the form of the boycott, and all of them constituting interferences with the contractual relations of other parties, involve the antagonism of labor unions to the employment of non-union men, and the procurement of their discharge or the prevention of their employment, by threats of a withdrawal of the union men from the same employment. With the exception of a few earlier cases,1 and one late case,2 which are to the contrary, the American cases very generally hold all such combinations against non-union men to be actionable conspiracies, even though no other means be employed than the threat of striking on the part of the union men, if non-union men are employed; and even where the only overt act is an agreement of the employer with the union that he will employ only union men.3 The case of Curran *v.* Gale is a very clear enunciation of the doctrine that it is an actionable conspiracy for an employer and a labor union to enter into an agreement that none but union men shall be employed by the former; or if a non-union man should be employed, he shall be discharged, if he does not within four weeks become a member of the union. The court held that the combination against the non-union man was unlawful without any specific agreement with the employer; and that the agreement was itself unlawful, and did not diminish the illegality of the action of the union in securing the dismissal of the non-union man, because he did not join the union. The court says, in part:4 —

"Public policy and the interests of society favor the utmost freedom in the citizen to pursue his lawful trade or calling, and if the purpose of an organization or combination of workingmen be to hamper or to restrict, that freedom, and through contracts or arrangements with employers, to coerce other workingmen to become members of the organization and to come under its rules and conditions under the penalty of the loss of their positions, and of deprivation of employment, then that purpose seems clearly unlawful and militates against the spirit of our government and the nature of our institutions. The effectuation of such a purpose would conflict with that principle of public policy which prohibits monopolies and exclusive privileges. It would tend to deprive the public of the services of men in useful employments and capacities. It would, to use the language of Mr. Justice Barrett in People ex rel. Gill *v.* Smith (5 N. Y. Cr. Rep. 513), 'impoverish and crush a citizen for no reason connected in the slightest degree with the advancement of wages or the maintenance of the rate.' Every citizen is deeply interested in the strict maintenance of the constitutional right freely to pursue a lawful avocation, under conditions equal as to all, and to enjoy the fruits of his labor without the imposition of any conditions not required for the general welfare of the community. The candid mind should shrink from the results of the operation of the principle contended for here; for there would certainly be a compulsion, or a fettering, of the individual, glaringly at variance with that freedom in the pursuit of happiness, which is believed to be guaranteed to all by the provisions of the fundamental law of the State."

A number of English cases have maintained the same position as to the illegality of interference by union men with the employment of non-union men.1 But so far as these cases may be taken as holding such acts of hostility to non-union men to be actual conspiracies at the common law, and not merely actionable under the different English statutes, which have from time to time imposed special restrictions upon labor combinations, they are undoubtedly overruled by the recent case of Allen *v.* Flood.1

The facts of this case were these: Allen, as the delegate of a union of iron-workers, represented to the Glengall Iron Company that if they did not discharge two of their workmen, Flood and Taylor, all the iron-workers would leave their employ; because the two workmen, who were wood-workers, had on other jobs done iron work, which was against the interest of the iron-workers. The Glengall Iron Company, under the intimidation of the fear that the iron-workers would leave the company if these workmen were retained in their employ, dismissed Flood and Taylor. The judgment was rendered in the trial court against Allen, but it was reversed in the House of Lords by a divided court. The prevailing judgment was that Allen had not been guilty of any actionable wrong in thus securing the dismissal of Flood and Taylor, inasmuch as there was no proof of violence, or threats, or other physical intimidation being employed to secure such dismissal. The court relied upon the prior case of Mogul S. S. Co. *v.* Macgregor, which has been so fully discussed in a preceding section.2

In rendering judgment for the appellant and reversing the judgment below in favor of Flood and Taylor, Judge Herschell said in part:3 —

"It is said that the statement that the defendant would call the men out, if made, was a threat. It is this aspect of the case which has obviously greatly influenced some of the learned judges. Hawkins, J., says that the defendant, without excuse or justification, 'willfully, unlawfully, unjustly and tyrannically, invaded the plaintiffs' right by intimidating and coercing their employers to deprive them of their present and future employment,' and that the plaintiffs are therefore entitled to maintain this action. But 'excuse or justification' is only needed where an act is *prima facie* wrongful. Whether the defendant's act was so is the matter to be determined. To say that the defendant acted 'unlawfully' is with all respect to beg the question, which is whether he did so or not. To describe his acts as unjust and tyrannical proves nothing, for these epithets may be and are, in popular language, constantly applied to acts which are within a man's rights and unquestionably lawful. In my opinion these epithets do not advance us a step towards the answer to the question which has to be solved. The proposition is reduced to this, that the appellant invaded the plaintiff's right by intimidating and coercing their employers. In another passage in his opinion the learned judge says that there is no authority for the proposition that to render threats, menaces, intimidation or coercion available as elements in a cause of action, they must be of such a character as to create fear of personal violence. I quite agree with this. The threat of violence to property is equally a threat in the eye of the law. And many other instances may be given. On the other hand it is undeniable that the terms 'threat,' 'coercion,' and even 'intimidation,' are often applied in popular language to utterances which are quite lawful and which give rise to no liability either civil or criminal. They mean no more than this, that the so-called threat puts pressure, and perhaps extreme pressure, on the person to whom it is addressed to take a particular course. Of this again, numberless instances might be given. Even then if it can be said without abuse of language that the employers were 'intimidated and coerced' by the appellant, even if this be in a certain sense true, it by no means follows that he committed a wrong or is under any legal liability for his act. Everything depends on the nature of the representation or statement by which the pressure was exercised. The law cannot regard the act differently because you choose to call it a threat or coercion instead of an intimidation or warning.

"I understood it to be admitted at the bar, and it was indeed stated by one of the learned judges in the Court of Appeal, that it would have been perfectly lawful for all the ironworkers to leave their employment and not to accept a subsequent engagement to work in the company of the plaintiff. At all events I cannot doubt that this would have been so. I cannot doubt either that the appellant or the authorities of the union would equally have acted within his or their rights if he or they had 'called the men out.' They were members of the union. It was for them to determine whether they would become so or not, and whether they would follow or not follow the instructions of its authorities, though no doubt if they had refused to obey any instructions which under the rules of the union it was competent for the authorities to give, they might have lost the benefits they derived from membership. It is not for your lordships to express any opinion on the policy of trade unions, membership of which may undoubtedly influence the action of those who have joined them. They are now recognized by law; there are combinations of employers as well as of employed. The members of these unions, of whichever class they are composed, act in the interest of their class. If they resort to unlawful acts they may be indicted or sued. If they do not resort to unlawful acts, they are entitled to further their interests in the manner which seems to them best, and most likely to be effectual. If, then, the men had ceased to work for the company either of their own motion or because they were 'called out,' and the company in order to secure their return had thought it expedient no longer to employ the plaintiffs, they could certainly have maintained no action. Yet the damage to them would have been just the same. The employers would have been subjected to precisely the same 'coercion' and 'intimidation,' save that it was by act and not by prospect of the act; they would have yielded in precisely the same way to the pressure put upon them, and been actuated by the same motive, and the aim of those who exercised the pressure would have been precisely the same. The only difference would have been the additional result that the company also might have suffered loss. I am quite unable to conceive how the plaintiffs can have a cause of action, because, instead of the iron workers leaving, either on their own motion, or because they were called out, there was an intimation beforehand that either the one or the other of these courses would be pursued. * * * The object which the appellant and the iron workers had in view was that they should be freed from the presence of men with whom they disliked working, or to prevent what they deemed an unfair interference with their rights by men who did not belong to their craft—doing the work to which they had been trained. Whether we approve or disapprove of such attempted trade restrictions, it was entirely within the right of the iron workers to take any steps, not unlawful, to prevent any of the work which they regarded as legitimately theirs being intrusted to other hands. * * *

"The iron workers were no more bound to work with those whose presence was disagreeable to them than the plaintiffs were bound to refuse to work because they found that this was the case. The object which the defendant, and those whom he represented, had in view throughout was what they believed to be the interest of the class to which they belonged; the step taken was a means to that end. The act which caused the damage to the plaintiffs was that of the iron company in refusing to employ them. The company would not subordinate their own interests to the plaintiffs. It is conceded that they could take this course with impunity. Why, then, should the defendants be liable because he did not subordinate the interests of those

he represented to the plaintiffs? Self-interest dictated alike the act of those who caused the damage, and the act which is found to have induced them to cause it."

"* * * I do not doubt that every one has a right to pursue his trade or employment without 'molestation' or 'obstruction,' if those terms are used to imply some act in itself wrongful. This is only a branch of a much wider proposition, namely that every one has a right to do any lawful act he pleases without molestation or obstruction. If it be intended to assert that an act not otherwise wrongful always becomes so, if it interferes with another's trade or employment, and needs to be excused or justified, I say that such a proposition in my opinion has no solid foundation in reason to rest upon. A man's right not to work or not to pursue a particular trade or calling, or to determine when or where or with whom he will work is in law a right of precisely the same nature and entitled to just the same protection as a man's right to trade or work."

Commenting on the Mogul case, and claiming it as an authority in support of the appellant, Lord Herschell continues:—

"In that case the very object of the defendants was to induce shippers to contract with them, and not to contract with the plaintiffs, and thus to benefit themselves at the expense of the plaintiffs, and to injure them by preventing them from getting a share of the carrying trade. Its express object was to molest and interfere with the plaintiffs in the exercise of their trade. It was said that this was held lawful, because the law sanctions acts which are done in furtherance of trade competition. I do not think the decision rests on so narrow a basis, but rather on this, that the acts by which the competition was pursued were all lawful acts, that they were acts not in themselves wrongful, but a mere exercise of the right to contract with whom, and when, and under what circumstances, and upon what conditions they pleased. I am aware of no ground for saying that competition is regarded with special favor by the law; at all events I see no reason why it should be so regarded. * * * But if the alleged exception could be established, why is not the present case within it?

"What was the object of the defendant and the workmen he represented, but to assist themselves in their competition with the shipwrights? A man is entitled to take steps to compete to the best advantage in the employment of his labor, and to shut out, if he can, what he regards as unfair competition, just as much as if he was carrying on the business of a ship-owner. The inducement the appellant used to further his end was the prospect that the members of his union would not work in company with what they deemed unfair rivals in their calling. What is the difference between this case and that of a union of ship-owners who induce merchants not to enter into contracts with the plaintiffs, by the prospect that if at any time they employ the plaintiffs' ships they will suffer the penalty of being made to pay higher charges than their neighbors at the time when the defendants' ships alone visit the ports? In my opinion there is no difference in principle between the two cases."[1]

This subject of boycotting has recently been very fully considered by the Supreme Court of Illinois, in a case[1] in which the facts raise squarely the question whether a perfectly peaceful boycott brings the boycotter within the condemnation of the criminal law. In this case, the plaintiff conducted a laundry business, engaging others

to do the work, she receiving and delivering the same to her customers. In consequence of her refusal to fix the price for her work, in accordance with the scale of prices established by the laundrymen's association, she was boycotted; and those who had contracted with her to do her work, were induced to break their contracts with her, no force or fraud being used. The court held this to be an unlawful conspiracy, and punishable as such. A petition for rehearing was made, on the ground that counsel for defendants had, since the first hearing, met with the case of Allen *v.* Flood, and wanted it considered by the Supreme Court of Illinois. The court denied the rehearing, and added that the facts of Allen *v.* Flood were different from those in the present case. In the original hearing of the case[1] in declaring this boycott to be an unlawful conspiracy, the court said: "Appellants and those persons who refused to do appellee's work, had each a separate and independent right to unite with the organization known as the 'Chicago Laundrymen's Association,' but they had no right separately, or in the aggregate, with others, to insist that the appellee should do so, or to insist that appellee should make her scale of prices the same as that fixed by the association, and make her refusal to do this a pretext for destroying and breaking up her business. A combination by them to induce others not to deal with appellee, or enter into contracts with her, or do any further work for her, was an actionable wrong. Every man has a right, under the law, as between himself and others, to full freedom in disposing of his own labor or capital according to his own will, and any one who invades that right without lawful cause or justification, commits a wrong."

In denying the petition for a rehearing,[1] the Court say:—

"The facts in the case of Allen *v.* Flood are entirely different from the facts presented in this record. There was no contract in that case, the breach of which was induced by the defendant (meaning, as stated in another part of the opinion, that in the case of Allen *v.* Flood, the men, who were discharged, at the instance of Allen, were only employed from day to day). Here, existing contracts which were a property right in the plaintiff (the appellee) were broken, and this was brought about by the action of the defendants in inducing those contracting with her to violate their contracts. This caused a right to be taken away, in consequence of which she was injured and damaged." If this explanation of the difference in the facts of the two cases is to be accepted as an announcement that the Supreme Court of Illinois would have decided the Doremus case in accordance with the ruling in the case of Allen *v.* Flood, if there had been no continuing contract for the doing of the laundry work of the plantiff, the court has made a material modification of the generally prevalent American doctrine.

This modern view of the law of conspiracy is not limited in its application to the acts of labor combinations. Giving only a passing reference to a conspiracy of church members to get rid of the minister,[2] we find that in some cases, it is held to be an actionable wrong for a combination of tradesmen to agree not to sell goods to a particular person or a particular class of persons, but the cases do not all hold the same view. In one case, an association of retail dealers in lumber agreed not to buy of manufacturers who sold directly to consumers. Such associations of middle men are to be found in almost every city and town, and most of them pursue this policy. This, action of the association was held to be lawful.[1] But, in Indiana, a similar condemnation of the sale of lumber to brokers, who did not keep lumber yards, was

declared to be an unlawful conspiracy; and the manufacturer, against whom the rule was enforced, could recover damages.2 The same conclusion was reached as to the illegality of the acts of an association of wholesale lumber dealers who had agreed not to sell to any but regular retail dealers, in threatening to notify the retail dealers not to deal with plaintiff unless he joined their association.3 It was also held to be an unlawful and actionable conspiracy for manufacturers, in a boycott of a rival manufacturer, to agree not to sell their goods to dealers who bought the goods of the latter.4 In the note below5 will be found cases cited, in which the boycott of rival dealers was purely malicious, and was conducted without any justifiable motive and not in pursuit of any justifiable economic end. They were, of course, declared to be actionable wrongs. In a Texas case, it was held to be an actionable conspiracy for dealers to agree not to sell to a consumer, who was indebted to one of them; and the court expressly laid down the rule, that, while a person has the right to refuse to have dealings with another, with or without reason, "the privilege is limited to the individual action of the party who asserts the right. It is not equally true that one person may from such motives influence another person to do the same thing."1 But a contrary ruling was made in some Kentucky cases2 in which a similar agreement, not to sell to any one indebted to any member of the association, was made a part of the obligations of the members. Likewise, in a Rhode Island case, it was held to be lawful for an association of plumbers to agree not to buy of wholesale dealers in plumbers' goods, who sold to a plumber who was not a member of the plumbers' association. This was held to be lawful competition.3

While it is not the habit, in general, for employers to combine for mutual protection against employees, since in most cases the individual employer finds himself strong enough to cope with the demands of the trade union, a combination has been made among certain classes of employers, street-car companies for example, one of whose regulations is that the members, on being notified, shall not give employment to a workman who is on a strike with a member of the combination. When a strike is ordered, in such a case, a list of the names of the strikers is sent to the members of the association, who will, in carrying out their obligations to the association, refuse to give employment to a striker who applies for work. In Pennsylvania, it has been held that such a combination does not constitute an unlawful conspiracy.4 But a contrary ruling was made in a case in which an apprentice, who had been in the employ of B. & Co., under indentures which were supposed to be valid but which were not, was discharged, and the employer notified others in the same trade not to engage this apprentice. The court held that the apprentice was entitled to damages, because this notice of his discharge had prevented his procuring employment.1

A word of explanation, why I have given so much prominence to the two English cases of *Mogul Steamship Company* v. *MacGregor,* and *Allen* v. *Flood,* in this discussion, is not inappropriate. In England, the right of capitalists, manufacturers and traders to combine for mutual economic advantage, has never been materially affected by statutory modifications. On the other hand, combinations of workingmen have until a late day been prohibited in England by statute. These statutes have now been repealed, and trades-unions and other labor combinations have been expressly legalized. The first of these English cases gives a most elaborate statement of the common law as to the legality of capitalistic combinations; while the second case

presents the same law as it bears upon the legality of labor combinations, both unaffected by statutory condemnation or restrictions of such combinations. In the United States, on the other hand, legislatures have been so exceedingly active in controlling, restricting, and finally in prohibiting all combinations in restraint of trade and competition, that it is almost impossible for an analytical jurist to determine to what degree these statutes have controlled the judicial opinion, as to what acts constitute at common law an actionable conspiracy. A comparison of these two English cases with the American decisions on trade and labor combinations will also be helpful in pointing out how much confusion of thought can be created by ill-considered and poorly constructed legislation on a problem, which reaches so deep down into the mysteries of human desires, and which is so completely within the control of the inexorable laws of nature, and the social forces.

[Back to Table of Contents]

§ 116.

Wagering Contracts Prohibited.—

At all times in the history of the English and American law, gambling of every variety has been the subject of police regulation. The lower and more common forms of gambling, when conducted as a business, are now uniformly prohibited and the prosecution of them made a penal offense. Ordinarily, however, wagers or bets are only so far prohibited or regulated that the courts refuse to perform the contracts. Independently of statute, no wager of any kind constitutes a penal offense. It requires statutory legislation to make betting a misdemeanor. Indeed, such legislation would be open to serious constitutional objections. Gambling or betting of any kind is a vice and not a trespass, and inasmuch as the parties are willing victims of the evil effects, there is nothing which calls for public regulation.1 But when they pursue gambling as a business, and set up a gambling house, like all others who make a trade of vice, they may be prohibited and subjected to severe penalties.2 And so, also, if they apply to the courts for aid in enforcing the contracts made in the indulgence of this vice, the courts can properly refuse to assist them.

A wager or bet, according to Mr. Bouvier, is "a contract by which two parties or more agree that a certain sum of money or other things, shall be paid or delivered to one of them on the happening, or not happening, of an uncertain event." Employing the word in this sense, it is pretty well settled that all wager contracts were not void at common law. The distinction between the legal and the illegal wagers seems to rest upon the good or evil character of the event or act, which constitutes the subject-matter of the wager. If the wager was about a harmless and legal act or event, the wager was itself legal, and the wager contract could be enforced.1 But if the wager has reference to the happening or doing of some act which is illegal or against good morals, the wager is void and will not be enforced.2 In no part of the civilized world are contracts for the insurance of life or property against accidental destruction held to be invalid.

The English doctrine is clearly sustained, as a part of the common law, by the decision of some of the American courts.3 But, except in the matter of insurance contracts, all wager contracts are declared to be invalid in Maine, Massachusetts, New Hampshire, Vermont, and Pennsylvania, whatever may be the character of the event or act, which constitutes the foundation for the wager.4 In many of the States, the common law is changed by statutes which prohibit all wager contracts, and forbid their enforcement by the courts. Thus, by the New York Revised Statutes,1 "all wagers, bets, or stakes, made to depend upon any race, or upon any gaming by lot or chance, casualty, or unknown or contingent event whatever, shall be unlawful. All contracts for, or on account of, any money or property or thing in action so wagered, bet or staked shall be void."2 It is to be observed, that in all of these judicial and legislative determinations of the illegality of wagering contracts, although they differ in respect to the legality of particular wagers, they all rest upon the proposition that the prohibited wagers tend to develop and increase the spirit of gambling and at the

same time serve no useful purpose. For these reasons all contracts, based upon such wagers, are declared to be illegal. Inasmuch as insurance contracts serve a useful purpose, they are not prohibited; and it is not likely that a law, prohibiting them, would be sustained. It is, therefore, the evil effect of betting, coupled with its practical uselessness, that justifies its prohibition; for all unobjectionable contracts have, as an incident of property, an inalienable right to some effective remedy in the courts of the country.3

[Back to Table of Contents]

§ 117.

Option Contracts, When Illegal.—

The common forms of gambling are not difficult to define or distinguish from harmless or unobjectionable transactions. The enforcement of the law against gambling in such cases is not trammeled with confusion as to what constitutes the *gravamen* of the offense. It is the staking of money on the issue of games of chance, or on the happening or not happening of a contingent event or act, in those cases in which the wager does not promote a public or private good. For many years, in all parts of the commercial world, a species of commercial gambling has been devised and developed, and which is still increasing in proportions. Large bodies of men in our commercial centers congregate daily in the exchanges for the purpose of betting on the rise and fall in the price of stocks, cotton, and produce. The business is disguised under the name of speculation, but it is nothing different from the wager on the result of some game of cards. The card player bets that he will win the game. The merchant, dealing in "futures," bets that the price of a commodity will, at a future day, be a certain sum, more or less than the ruling market price. In neither case does the result add anything to the world's wealth; there is only an exchange of the ownership of property without any benefit to the former owner. In the liquidation of both bets, A. passes over to B. a certain proportion of his property. Under the guise of speculation, it is given an air of respectability which makes the indulgence in it all the more dangerous to the public welfare. The disreputable character of the common forms of gambling, made so by public condemnation, is the chief protection against the evil. But men of respectability are engaged in option dealing; and the apparent respectability of the business develops, to a most alarming extent, the gambling spirit in all classes of society. Instead of striving to produce something that will increase the world's wealth, while they accumulate their own, these men are bending every energy, and taxing their ingenuity, to take away what his neighbor has already produced. Apart from this injury to the public material and moral welfare, the commercial gambling, when developed to its present enormous proportions, unsettles the natural values of commodities, and the fate of the producer is made to depend upon the relative strength of the "bulls" and "bears." Conceding the truth of these charges, and the evil effect of this species of gambling which has never been seriously questioned, it would be a legitimate exercise of police power to prohibit these commercial transactions.[1] The difficulty lies not in the justification of this prohibitory legislation, but in discovering the wrongful element in the transactions, and in distinguishing them from legitimate trading. The so-called "option contracts" are in form contracts for the sale or purchase of commercial commodities for future delivery, at a certain price, with the option to one or both of the parties in settlement of the contract to pay the difference between the contract price, and the price ruling on the day of delivery; the difference to be paid to the seller, if the market price is lower than the contract price, and to the purchaser, if the market price is higher. Such a contract has three striking elements: first, it is a contract for future delivery; secondly, the delivery is conditional upon the will of one or both of the parties; and thirdly, the

payment of differences in prices, in the event that the right of refusal is exercised by one of the parties. If the common-law offense of *regrating* were still recognized in the criminal law, all contracts for future delivery may be open to serious question.2 But that rule of the common law is repudiated, and it may now be considered as definitely settled that a contract for future delivery of goods is not for that reason invalid. If they infringe the law, it must be for some other reason than that the contract stipulates for future delivery. This is not only true, when the vendor has the goods in his possession at the time of sale, but also when he expects to buy them for future delivery. Lord Tenterden claimed that in the latter case the contract was a wager on the price of the commodity, and for that reason should not be enforced.1 But the position here taken has since been repudiated by the English courts, on the ground that it is not a wager, and if a wager, not one which tends to injure the public.2 The late English opinion is generally followed in the United States, and it may be stated, as the general American rule, that *bona fide* contracts for the future delivery of goods are not invalid, because at the time of sale the vendor has not in his actual or potential possession the goods which he has agreed to sell.3

It is also held to be an unobjectionable feature in such contracts, that the vendee has no expectation of receiving the goods purchased into his actual possession, but intends to resell them before the delivery of the possession to him.1 To quote the words of the Kentucky court, "sales for future delivery have long been regarded and held to be indispensable in modern commerce, and as long as they continue to be held valid, one who buys for future delivery has as much right to sell as any other person, and there cannot, in the very nature of things, be any valid reason why one who buys for future delivery may not resolve, before making the purchase, that he will resell before the day of delivery, and especially when, by the rules of trade and the terms of his contract, the person to whom he sells will be bound to receive the goods from the original seller, and pay the contract price."2

Nor is a contract necessarily hurtful to the public welfare, which provides on payment of a valuable consideration that one at a future day shall have the right to buy certain property or sell other property, according as one or the other happens to be advantageous to him. One may have a lawful and beneficial end in view in acquiring such a right of refusal.3 "Mercantile contracts of this character are not infrequent, and they are consistent with a *bona fide* intention on the part of both parties to perform them. The vendor of goods may expect to produce or acquire them in time for a future delivery, and, while wishing to make a market for them, is unwilling to enter into an absolute obligation to deliver, and therefore bargains for an option which, while it relieves him from liability, assures him of a sale, in case he is able to deliver; and the purchaser may, in the same way, guard himself against loss beyond the consideration paid for the option, in case of his inability to take the goods. There is no inherent vice in such a contract."1 And the consideration for this option may very properly be the difference between the ruling market price and the price specified in the contract. For that would be the damage to the other party, resulting from the sale of the option or refusal.2

If each of the preceding propositions is correct, then the illegality of option contracts must depend upon the intention of the parties not to deliver the goods bargained for,

but merely to pay the difference between the market price and contract price. The cases are unanimous in the opinion that a contract, for the payment of difference in prices, arising out of the rise and fall in the market price above or below the contract price, is a wager on the future price of the commodity, and is therefore invalid.3 It has, however, been held that the true test, for determining whether an option deal is a gambling transaction, is whether the contract can be settled in money, or the vendor or vendee can compel the delivery of the goods.1

If the contracts were in form, as well as in fact, agreements to pay the difference in prices, they could be easily avoided, and thrown out of court. But the contracts never assume the form of wagers on the price of the commodity. They are always in form undistinguishable from those option contracts, in which the parties in good faith have bargained for the refusal of the goods, and which are valid contracts. The following is a good illustration of the ambiguity of the form of the contract. "For value received, the bearer (S.) may call on the undersigned for one hundred (100) shares of the capital stock of the Western Union Telegraph Company, at seventy-seven and one-half (77½) per cent., at any time in thirty (30) days from date. Or the bearer may, at his option, deliver the same to the undersigned at seventy-seven and one-half (77½) per cent., any time within the period named, one day's notice required."1 There is no evidence on the face of this contract of the determination of the parties to settle on the differences in price; and while such a contract may be used as a cover for commercial gambling, it is not necessarily a wager on the future price of the commodity.

It is the ordinary rule of law that where a writing is susceptible of two constructions, one of which is legal, and the other illegal, that construction will prevail, which is in conformity with the law.2 Applying this rule to the construction of option contracts, it has very generally been held that these contracts are valid and enforcible, unless it be proven affirmatively that the parties did not intend to make a delivery of the goods bargained for, but to settle on the differences.3 And if it be shown that only one of the parties entertained this illegal intention, while the other acted in good faith, the contract will be void as to the first, but will be enforcible in behalf of the second.4 In delivering the opinion of the New York Court of Appeals5 Earl, J., said: "On the face of the contract the plaintiff provided for the contingency that on that day he might desire to purchase the stock, or he might desire to sell it, and in either case there would have to be a delivery of the stock, or payment in damages in lieu thereof. We should not infer an illegal intent unless obliged to. Such a transaction, unless intended as a mere cover for a bet or wager on the future price of the stock, is legitimate and condemned by no statute, and that it was so intended was not proved. If it had been shown that neither party intended to deliver or accept the shares, but merely to pay differences according to the rise or fall of the market, the contract would have been illegal." This rule of construction is adopted by most of the courts, in determining the legality of these questionable contracts, but a different rule has been laid down by the Supreme Court of Wisconsin. The contract, which constituted the subject of the suit, was in form a legitimate transaction, and there was no proof that it was used as a cover for commercial gambling. The court declared it to be the duty of the plaintiff to show that he had made a *bona fide* contract for the delivery of the commodities bought and sold, instead of throwing upon the defendant the burden of proving that the contract was made for the payment of differences in price, and did not

contemplate any delivery of the grain. The court claimed that it would "not do to attach too much weight or importance to the mere form of the contract, for it is quite certain that parties will be as astute in concealing their intention, as the real nature of the transaction, if it be illegal." It may be safely assumed, that the parties will make such contracts valid in form; but courts must not be deceived by what appears on the face of the agreement. It is often necessary to go behind, or outside of, the words of the contract—to look into the facts and circumstances which attended the making of it—in order to ascertain whether it was intended as a *bona fide* purchase and sale of the property, or was only colorable. And to justify a court in upholding such an agreement, it is not too much to require a party claiming rights under it, to make it satisfactorily and affirmatively appear that the contract was made with an actual view to the delivery and receipt of grain, not as an evasion of the statute against gaming, or as a cover for a gambling transaction."[1] The power of the legislature to change this rule of construction,[2] and to throw the burden of proof of the legality of the contract upon the party asserting it, cannot be questioned. But it is not within the power of the court to change it, as was done by the Wisconsin court. For the effective prevention of this commercial gambling, this change is most needful, and with one other regulation, which will be suggested here, the prohibition can be made as effective as any prohibition of an act, which operates as a trespass only indirectly through its injurious effects. The other needful regulation would be the prohibition of all contracts of sale for future delivery, where the vendor has neither the actual, constructive, nor potential possession of the goods sold. A man has an absolute right, in his personal or representative capacity, to sell for future delivery any goods which he may have in his actual or constructive possession, or which he may have the present capacity of acquiring at some future day. One has the right to sell commodities which he has purchased from another for future delivery, or to sell a growing or other future crop, or the flour that his mill will grind during a stated period. But one can serve no useful end by selling goods for future delivery, goods which he does not own, and which he does not expect to possess. Such future contracts may therefore be prohibited. With the aid of this legislation, and by casting the burden of proof upon him who asserts the legality of these questionable or doubtful contracts, gambling in futures may be subjected to a more effective restraint.

[Back to Table of Contents]

§ 118.

General Prohibition Of Contracts On The Ground Of Public Policy.—

In the preceding sections, we have given many cases of contracts, which are declared to be invalid, because their enforcement is contrary to public policy, for more or less satisfactory reasons. It only remains to be stated generally, that whenever a contract is made, having for its subject-matter the commission of some offense against the law, the violation of some rule of morality, or the commission of some injury to the public health, the contract can not be enforced; and the courts will leave the parties to the contract and their property in the same position in which they are found. No right of action can be maintained, which has the invalid contract for a legal basis. It is neither possible nor advisable in this connection to refer to special cases; the principle is the same in all cases, and the whole subject will be found discussed in all of the numerous treatises upon the law of contracts.[1]

[Back to Table of Contents]

§ 119.

Licenses.—

It is the common custom in all of the towns and cities of the United States to require the payment of a certain sum of money as a license, for the privilege of prosecuting one's profession or calling. The license is required indiscriminately of all kinds of occupations, whatever may be their character, whether harmful or innocent, whether the license is required as a protection to the public or not. The one general object of such ordinances, as a whole, whatever other reasons may be assigned for the requirement of a license in any particular occupation, can only be the provision of a reliable source of revenue. It is one of "the ways and means" of defraying the current expenses. While the courts are not uniform in the presentation of the grounds upon which the general requirement of a license for all kinds of employments may be justified; on one ground or another, the right to impose the license has been very generally recognized.1 Whatever refinements of reasoning may be indulged in, there are but two substantial phases to the imposition of a license tax on professions and occupations. It is either a license, strictly so-called, imposed in the exercise of the ordinary police power of the State, or it is a tax, laid in the exercise of the power of taxation. In many cases it becomes exceedingly important to determine under which power the particular license is imposed. For example, if a license is a tax the bill must originate in the house of representatives, according to the almost universal requirement of constitutional law. But if it is a police regulation, the bill providing for it is constitutional in whichever house it was introduced.2

For examples, I will refer to various licenses which have been imposed upon different callings and trades; and it will be seen by a perusal of the cases, that the courts are not always clear whether, in the imposition of the license, the legislature is exercising its police power or the power of taxation. It has thus been held to be reasonable to exact a license from hucksters and peddlars.3 A license tax has been held to be reasonable when imposed upon vendors of milk—evidently as a police regulation, since they are prohibited from plying their calling without the license;1 upon the vendors of cigarettes,—evidently justifying the apparently excessive amount of the license by the consideration, that the sale of cigarettes was injurious to the health of those who smoke them;2 upon attorneys and physicians,3 upon bakers,4 bankers,5 hacks and drays and other vehicles.6 So, likewise, may a license tax be exacted of keepers of places of amusements of all kinds,1 of dealers in second-hand articles, and pawn-shops,2 insurance brokers, whether they are residents, or come from another State,3 auctioneers.4 In short, the State has the power to impose a license fee, either as a tax or a police license, upon every kind of business; of course, including the trade in intoxicating liquors.5

Where, however, a State in the exercise of the police power, lawfully prohibits a certain trade or calling, the municipalities cannot give a lawful license to carry on such a calling.1 And if a trade, such as the liquor trade, has been licensed, the

enactment of a prohibitive law repeals the license.2 So, also, the fact that the United States Government has granted a license to sell oleomargarine, does not permit one to sell the article in a State, in opposition to a State law which prohibits it altogether.3

The distinction between a license fee, imposed in the exercise of the police power, and a license tax levied in the exercise of the taxing power, should be clearly explained and fully set forth.

In preceding sections, it has been explained how the right to pursue the ordinary callings of life exists independently of government, and the pursuit of them can only be so far restrained and regulated, as such restraint and regulation may be required to prevent the doing of damage to the public or to third persons. Where the calling is not dangerous to the public, either directly or incidentally, it cannot be subjected to any police regulation whatever which does not fall within the power of taxation. But those occupations which require police regulation, because of their peculiar character, in order that harm might not come to the public, can be subjected to whatever police regulation may be necessary to avert the threatened danger. Among other measures, that would be justifiable in such cases, would be a more or less rigid police supervision of those who may be permitted to pursue the calling. Hence, it would be lawful and constitutional for the State or town to require all those who follow such a vocation to take out a license. On this principle, attorneys, physicians, druggists, engineers and other skilled workmen, may be required to procure a license, which would certify to their fitness to pursue their respective callings, in which professional skill is most necessary, and in which the ignorance of the practitioner is likely to be productive of great harm to the public, and to individuals coming into business relations with them. So, also, the licensing of dramshops, green groceries, hackmen and the like, is justifiable, in order that these callings may be effectually brought within the police supervision, which is necessary to prevent the occupation becoming harmful to the public. The dramshop is likely to gather together the more or less disreputable and dangerous classes of society; the green grocers are likely, if not honest, to sell to their customers meat that is stale and unhealthy; and the hackmen are inclined, if not watched by the public authorities, to practice frauds upon the public against which they cannot very well protect themselves without police aid. In the regulation of all such occupations, it is constitutional to require those who apply for a license to pay a reasonable sum to defray the expense of issuing the license and of maintaining the police supervision. What is a reasonable sum must be determined by the facts of each case; but where it is a plain case of police regulation, the courts are not inclined to be too exact in determining the expense of procuring the license, as long as the sum demanded is not altogether unreasonable.1 But where the license tax is imposed upon a business which is wholly or in large part interstate commerce, it cannot be sustained as a police regulation if it so exceeds in amount the needs of a license fee, as a police regulation, as to amount to a restriction upon interstate commerce. It is for that reason unconstitutional.1

The evils, growing out of some occupations, may be such that their suppression can only be attained to any appreciable degree by the imposition of a restraint upon the pursuit of such callings or kinds of business. For example, the keeping of saloons produces public evil in proportion to the number of low groggeries, which are allowed

to be opened; and in any event the evil is lessened by reducing the number of saloons of all grades of respectability. One of the most effective modes of restraining and limiting the number of saloons in any particular town or city is to require a heavy license of the keepers of them. Such a license may, probably, be justified on the ground that, since the prosecution of the business entails more or less injury upon society, it is but just that those who make profit out of the traffic should bear the burden of liquidating the damage done to the public in the form of increased pauperism and crime. In Minnesota, an act provided for the payment of a license by all keepers of saloons and dramshops, which would be devoted to the establishment of a fund for the foundation and maintenance of an asylum for inebriates. In declaring the act to be constitutional, the court advanced the following reasons in support of it: "It is very apparent from its provisions, that the law in effect is one further regulating traffic in intoxicating drinks. Such is manifestly one of its objects, and its principal features and provisions accord with this idea. It requires of those desiring to prosecute business the procuring of a special license as a condition precedent to the exercise and enjoyment of such a right. It regards the traffic as one tending to produce intemperance, and as likely, by reason thereof, to entail upon the State the expense and burden of providing for the class of persons rendered incapable of self-support, the evil influence of whose presence and example upon society is necessarily injurious to the public welfare and prosperity, and, therefore, calls for such legislative interposition as will operate as a restraint upon the business, and protect the community from the mischief, evils and pecuniary burthens following from its prosecution. To this end the special license is required, and the business restricted to such persons as are willing to indemnify the State, in part, against its probable results and consequences, by contributing toward a fund that shall be devoted exclusively to that purpose in the manner indicated in the act. That these provisions unmistakably partake of the nature of police regulations, are strictly of that character, there can be no doubt, nor can it be denied that their expediency or necessity is solely a legislative, and not a judicial, question.

"Regarding the law as a precautionary measure, intended to operate as a wholesome restraint upon a traffic, and as a protection to society against its consequent evils, the exacted fee is not unreasonable in amount, and the purpose to which it is devoted is strictly pertinent and appropriate. It could not be questioned but that a reasonable sum imposed in the way of an indemnity to the State against the expense of maintaining the police force to supervise the conduct of those engaged in the business and to guard against disorders and infractions of law occasioned by its prosecution, would be a legitimate exercise of police power, and not open to the objection that it was a tax for the purpose of revenue, and therefore unconstitutional. Reclaiming the inebriate, restoring him to society, prepared again to discharge the duties of citizenship, equally promotes the public warfare and tends to the accomplishment of like beneficial results, and it is difficult to see wherein the imposition of a reasonable license fee would be any less a proper exercise of the power in one case than in the other."[1]

But that disposition of the license fees is not necessary as a justification of the law which exacts them. The money, collected by way of a license as a police regulation, may go into the State treasury for general revenue purposes, and need not be devoted specially to the relief of burdens which the prosecution of the trade or occupation

imposed on the State, provided that the character of the occupation is such that restrictions upon its pursuit, looking to its partial suppression, would be constitutional, whatever their character may be. Since the primary object of such a law would be to operate as a restriction upon the trade, and not to raise a revenue, the incidental increase in the revenue would constitute no valid objection to the law.2

The amount demanded for the license, in such a case, would be determinable by the legislature. It would be a legislative, and not a judical question.1 But it is a judicial question whether the particular occupation or trade can, under the constitutional limitations, be restrained.2 One, desiring to practice law or medicine, can be required to obtain a license from some court or other State authority, to which he is entitled, after passing a satisfactory examination into his qualifications for the profession; and he can be required to pay a small fee to cover the expense incurred in issuing the license; but he could not be rightfully compelled to pay a large amount, exacted of him with a view to reduce the number of the practitioners of these professions, although they may be overcrowded. A green grocer may be required to take out a license, in order that the proper police supervision may be maintained over his business to prevent the sale of unwholesome meat; and he may be required to pay a reasonable sum to defray the expenses of this necessary police inspection; but the number of green grocers cannot be restrained by requiring a large sum in payment for his license. In order to justify a restrictive license, the business must itself be of such a nature that its prosecution will do damage to the public, whatever may be the character and qualifications of those who engage in it. Such would be the keeping of a saloon or dramshop.3 Once having been judicially ascertained that the trade or occupation may be restrained, it is a matter of legislative discretion what kind of restraint should be imposed. The prosecution of the trade then becomes a privilege, for which as large a price can be demanded by the State as it may see fit. And it may be withheld or granted at the discretion of the State.1

So, likewise, discriminations are in such cases allowed on grounds of public policy, which would not be permissible in the case of a harmless and unobjectionable occupation, upon which it is proposed to impose, under the taxing power, a license tax. Thus, we have in an earlier section2 seen that it is permissible for a law to prohibit the employment of females in drinking saloons or bar-rooms. There is such a law in California. The city of Stockton passed an ordinance which imposes a license charge of $30 per quarter upon such places in general, but exacted a license fee of $150 per month for keeping a saloon or bar-room, wherein a female acts as bartender, actress, dancer, singer, etc. The discrimination, in the amount of the license tax, between the two classes of saloons was held not to violate the constitutional prohibition of all discriminations as to sex in the pursuit of any lawful business.3 And an ordinance of San Francisco denied all licenses to sell intoxicating liquors to persons who have females employed in their saloons as waitresses, in violation of the State law. The ordinance was attacked on the ground that it was an *ex post facto* law. It certainly would have been so held, if it related to the exercise of any vested or natural right. But since the character of the saloon business is such that it has been judicially declared to be subject to total prohibition, the granting of the licenses to engage in that business rests in the discretion of the legislature, both as to the number and as to the character of the persons, to whom the licenses shall be awarded. And so

it was held in this San Francisco case.1 But it must not be understood that the legislative discretion, in granting and withholding a license to do any kind of business, is unlimited and is uncontrolled by any fundamental principles of justice and impartiality towards individuals. The constitutional principle of equality and uniformity as to all parties, who come within the operation of the law, must be strictly observed. A discrimination against a part of such a class, by the confinement of the regulation or license to that part, and the exemption of the other members of the same class from its obligations, would make the law for that reason unconstitutional, unless there was some justifiable reason for the discrimination, and of this the courts are the final judge. Several cases of this kind may be cited. Thus, a law has been held in Minnesota to be unconstitutional because it is class legislation, involving unjust discrimination, in that it required a license of hawkers and peddlers in general, but excepted from its provisions "any manufacturer, mechanic, nurseryman, farmer, butcher, * * * selling, as the case may be, his manufactured articles, or products of his nursery or farm or his wares," etc.2 There does not seem to be any substantial reason why this distinction should be made. So, likewise, in a North Carolina case, an act was held to be unconstitutional which imposed a license fee of $1,000 upon anyone who was engaged in the business of hiring labor in certain counties of the State, to be employed outside of the State.3

In a California county, the board of supervisors, in their regulations of private asylums, for the insane and those suffering from inebriety and nervous diseases, required, *inter alia,* that no license be given to any one to carry on such a business, unless (1) the buildings are fire-proof, and the grounds adjoining the asylum are surrounded by a wall at least eighteen inches thick and twelve feet high, and the entire premises are located at least four hundred feet from any dwelling house or school house, (2) that no license shall be granted where male and female patients are cared for in the same building. These two regulations were held to be void because they were an unreasonable and arbitrary exercise of the police power.1 This is an especially strong case in illustration of the supervisory power of the judiciary over legislative police regulations, as the business is one that could be prohibited as a private business, with more convincing grounds of justification than can ordinarily be found in other cases of governmental monopolies.2

The antipathy of the inhabitants of California and other Pacific States to the Chinese has caused the enactment of some very unjustifiable police regulations, which were designed to drive the Chinese out of those States. The Chinese Exclusion Act has already been referred to.3 And other regulations, hostile to them, have been discussed elsewhere. Inasmuch as laundering has been and is still their chief industry, and they do the work by hand, in Montana and probably elsewhere, discriminations have been made against them by exacting a higher license from hand laundries than is required of the steam laundries. The Montana statute imposed a license tax of $25 per quarter on every laundry, except steam, in which more than one is employed, and a tax of $15 per quarter on steam laundries. The State Supreme Court held the act to be constitutional;1 while the United States court pronounced it unconstitutional, as in violation of the Fourteenth Amendment of the Federal Constitution, in that it denies the equal protection of the laws.2 This decision of the United States District Court will undoubtedly be sustained by the higher courts, if the State of Montana should

appeal. For in a somewhat similar case, an ordinance of the city of San Francisco,—which was by no means so unreasonable, as the Montana statute, in its restrictions upon the laundry business; and which on its face does not give rise to any strong conviction that the motive of the ordinance was an unjust discrimination against the Chinese,—was declared by the Supreme Court of the United States to be unconstitutional.3 The ordinance was as follows: "It shall be unlawful, from and after the passage of this order, for any person or persons to establish, maintain or carry on a laundry within the corporate limits of the city and county of San Francisco without having first obtained the consent of the board of supervisors, except the same be located in a building constructed of brick or stone." The court held it to be in violation of the Fourteenth Amendment of the United States Constitution, because it gives the board of supervisors the arbitrary power to grant or withhold licenses, guided and limited by no general rules.

"It allows without restriction the use for such purposes of buildings of brick or stone; but as to wooden buildings, constituting nearly all those in previous use, it divides the owners or occupiers into two classes, not having respect to their personal character and qualifications for the business, nor the situation, nature and adaptation of the buildings themselves, but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom that consent is withheld, at their mere will and pleasure. And both classes are alike only in this, that they are tenants at will, under the supervisors, of their means of living. The ordinance therefore, also differs from the not unusual case, where discretion is lodged by law in public officers or bodies to grant or withhold licenses to keep taverns or places for the sale of spirituous liquors, and the like, when one of the conditions is that the applicant shall be a fit person for the exercise of the privilege, because in such cases the fact of fitness is submitted to the judgment of the officer, and calls for the exercise of a discretion of a judicial nature."

The facts clearly showed an arbitrary discrimination against the Chinese.

On the other hand, a State law, which authorized the issue of licenses to hawk and peddle goods and wares, to persons who are physically disabled, but prohibited the issue of such licenses to able-bodied persons, was held to be a reasonable and constitutional exercise of police power, with the reasonable objects of suppressing vagrancy, and of providing a means of livelihood for the halt and blind.1

In respect to the great majority of employments and occupations, the principles, explained above, have no application whatever. They not only do not threaten any evil to the public, but their prosecution to the fullest measure of success is a public blessing. Instead of placing trades in general under restraints and police regulations, in which a license would be required, the utmost freedom can best attain the greatest good to the public. When, therefore, we see municipal corporations, requiring licenses for the prosecution of all kinds of occupations and employments; if their action can be justified at all, it must rest upon some other grounds than as a police regulation. It can only be justified as a tax upon the profession or calling. Having the natural, inalienable right to pursue a harmless calling, he cannot be required to take out a

license before he can lawfully pursue it. For what is a license? "The object of a license," says Mr. Justice Manning,[1] "is to confer a right that does not exist without a license, and consequently a power to license involves in the exercise of it, a power to prohibit under pain or penalty without a license. Otherwise a license would be an idle ceremony, giving no right, conferring no privilege, and exempting from no pain or penalty. If the right existed previous to the law requiring the license, it would not exist afterwards without a license. The fact that a license is required to do an act, is of itself a prohibition of such act without a license."[2]

"A proper license tax is not a tax at all within the meaning of the constitution, or even within the ordinary signification of the word 'tax.' * * * The imposition of a license tax is in the nature of the sale of a benefit, or privilege, to the party who would not otherwise be entitled to the same. The imposition of an ordinary tax is in the nature of the requisition of a contribution from that which the party taxed already rightfully possesses."[3]

The following case, from the Supreme Court of Minnesota, covers the ground so effectually, in presenting the distinction between a "license" and a "tax" upon occupations, that an extensive quotation is given from the opinion of the court. The city council of St. Paul had by ordinance required a license fee of twenty-five dollars from every huckster of vegetables, who plied his trade in the streets of the city. In determining whether this was a license or a tax, the court said:—

"It is apparent that provisions of this section are founded upon the assumption that the common council, under the charter, possesses the power to license the pursuit of the particular calling or business mentioned, in and along the streets of the city, and to prescribe, as an incident thereto, when it may be followed, what sum shall be paid for the privilege, and also to prohibit the business entirely without a license, as an efficient means for the protection and enjoyment of the power itself. The ordinance is in entire harmony with this view and no other. It was not passed as suggested by counsel, by virtue of any power of supervision and control over streets, because powers of that character are conferred for the sole purpose of putting and preserving the public streets in a fit and serviceable condition, as such, by keeping them in repair and free from all obstructions and uses tending in any way to the hinderance or interruption of public travel, and to that end alone can they be exercised. The ordinance in question has no such object in view. On the contrary, it expressly authorizes the use of the public streets for the purposes of the licensed traffic during that portion of each day, when ordinarily the travel is the greatest, and when such traffic would be most likely to interfere with the free and uninterrupted passage of vehicles and footmen, and it contains no provision in any way restricting, or calculated to regulate, the manner in which the licensed business shall be conducted as to occasion the least public inconvenience. It cannot be claimed that it was enacted in the exercise of any police power for sanitary purposes, or for the preservation of good order, peace or quiet of the city, because neither upon its face, nor upon any evidence before us, does it appear that any provision is made for the inspection of any articles sold or offered for sale under the license, or for preventing the sale of any decayed or unwholesome vegetables; nor is there any restraint or regulation whatever, imposed upon the conduct of the business during the time it is permitted to be

prosecuted. The annual sum exacted for the license is manifestly much in excess of what is necessary or reasonable to cover expenses incident to its issue. The business itself is of a useful character, neither hurtful nor pernicious, but beneficial to society, and recognized as rightful and legitimate, both at common law and by the general laws, of the State. No regulations being prescribed in reference to its prosecution under the license, there could be little, if any, occasion for the exercise of any police authority, in supervising the business or enforcing the ordinance, and no cause for any considerable expense on that account. In view of these facts, it is quite obvious that the amount of the license fee was fixed with reference to revenue purposes, which it was the main object of the ordinance to promote, by means of a tax imposed upon the particular employment or pursuit, through the exercise of its power over the subject of granting license."1

It is, therefore, conclusive, that the general requirement of a license, for the pursuit of any business that is not dangerous to the public, can only be justified as an exercise of the power of taxation, or the requirement of a compensation for the enjoyment of a privilege or franchise. In respect to the latter ground, no substantial objection can be well laid to the requirement of a license. When the State grants a franchise, it may demand, as a consideration for its grant, some special compensation, and afterwards tax it as property *ad valorem.* Thus insurance companies, established by charter from one State, have no natural right to carry on business in any other State, and permission to do so is a privilege for which the payment of a substantial sum as license may be required.1 And, on the same general principle, has it been held lawful to require a license tax of owners of house-boats, which are kept on navigable rivers.2

The right of the State to tax professions and occupations, unless there is some special constitutional prohibition of it, seems to be very generally conceded. Judge Cooley says: "Taxes may assume the form of duties, imposts and excises, and those collected by the national government are very largely of this character. They may also assume the form of license fees, for permission to carry on particular occupations."3 The State and the town authorities may impose a separate tax upon the same occupation;1 and the fact, that the property used in trade is taxed *ad valorem,* does not constitute any objection to the imposition of a license tax upon the business.2

The most common objection, that is raised to the enforcement of a license tax, is that it offends the constitutional provision which requires uniformity of taxation, since the determination of the sum that shall be required of each trade or occupation must necessarily, in some degree, be arbitrary, and the amount demanded more or less irregular. But the courts have very generally held that the constitutional requirement as to uniformity of taxation had no reference to taxation of occupations. "We are unable to perceive how the ordinance in question violates art. 127, which requires taxation to be equal and uniform. Its words are: '*all* keepers or owners of stables where horses and carriages are kept for hire, etc.' The argument seems to be that the business of defendant's livery stable will not bear such a tax. To this it may be again replied—this does not profess to be a tax upon capital or profits, which are property; but on the person pursuing a certain occupation. To levy such a tax differently upon one and another in proportion to the success of each in such a pursuit would produce

the very inequality of which the defendants complain. As the ordinance stands, all are taxed alike."3

A more serious question is the character of the remedies that may be employed for the collection of the license tax. Where the tax is laid upon property, the usual remedy is a suit at law and a sale of goods necessary to liquidate the taxes due, or, in the case of real property, a sale of the property against which the taxes are assessed. And a sale of the goods under execution, issued on a judgment for the license tax, would be an altogether unobjectionable remedy. When the tax is lawfully laid against the individual, it becomes a debt which, like any other kind of indebtedness, can be reduced to judgment, and satisfaction obtained by a sale under execution of the judgment debtor's goods. But the usual remedy is to make the payment of the license tax a condition precedent to the lawful prosecution of the business, whether the license is executed in the enforcement of a police regulation, or as means of raising revenue. As a police regulation the denial of the right to engage in the business before taking out a license is but reasonable. The license operates as a prohibition, and there would clearly be no constitutional objection to a law, which even made it penal to prosecute the business without a license.1 But where the doing of business without a license, is made a criminal offense, all the requirements in the criminal law for notice, opportunity to be heard, and other safeguards against injustice and wrongful conviction, should be required to be observed in order to make the license law constitutional. Such a law was held to be unconstitutional, which authorized and required the county treasurer upon refusal to take out a required license "to seize any of the property upon which a lien is hereby created, belonging to such person, * * * and to sell the same in the manner provided for sheriffs;" because the act in question did not provide for giving notice to the owner of the seizure of such property. This was declared to be an unconstitutional taking of property.1

But the case assumes a different phase, when the occupation is merely taxed, and not licensed in the strict sense of the word. Can the State prohibit the prosecution of a trade or business until the tax is paid? Ordinarily it is conceded that this remedy may be adopted for the effectual collection of the tax. Judge Cooley says:2 "What method shall be devised for the collection of a tax, the legislature must determine, subject only to such rules, limitations, and restraints as the constitution may have imposed. Very summary methods are sanctioned by practice and precedent." In a note on the same page, he gives among the methods of collection resorted to, the following: "Making payment a condition precedent to the exercise of some legal right, such as the institution of a suit, or voting at elections, or to the carrying on of business; requiring stamps on papers, documents, manufactured articles," etc., and the United States government has employed in the internal revenue service a large force of detectives whose duty it is to discover and bring to punishment all those who are engaged in the manufacturing of distilled spirits. The right of the United States government to make the sale and manufacture of intoxicating liquors and tobacco illegal, unless a revenue license has been previously obtained, and the tax paid, has never been successfully contested, although the prosecutions for the violation of the law have been frequent.1 But the right of the States, in taxing the professions, to make the payment of the tax a condition precedent to the lawful pursuit of the business or profession, has been questioned, and likewise denied.2

"The popular understanding of the word license undoubtedly is a permission to do something which without license would not be allowable. This we are to suppose was the sense in which it was made use of in the constitution. But this is also the legal meaning. 'The object of a license,' says Mr. Justice Manning, 'is to confer a right that does not exist without a license.'3 Within this definition, a mere tax upon a traffic cannot be a license of the traffic, unless the tax confers some right to carry on the traffic, which otherwise would not have existed. We do not understand that such is the case here. The very act which imposed this tax repealed the previous law, which forbade the traffic and declared it illegal. The trade then became lawful, whether taxed or not; and this law, in imposing the tax, did not declare the trade illegal in case the tax was not paid. So far as we can perceive, a failure to pay the tax no more renders the trade illegal than would a like failure of a farmer to pay a tax on his farm render its cultivation illegal. The State has imposed a tax in such a case, and made such provision as has been deemed needful to insure its payment; but it has not seen fit to make the failure to pay a forfeiture of the right to pursue the calling. If the tax is paid, the traffic is lawful; but if not paid, the traffic is equally lawful. There is consequently nothing in the case that appears to be in the nature of license."1

While practice and precedent justify this summary method of collecting the tax upon occupations, it cannot be successfully denied that it is in contravention of natural right. Every one has a natural right to pursue any innocent calling, without permission from the government; and while the right of the government to tax an occupation may be conceded, the imposition of the tax creates only a debt between the individual and the State; and the same remedies may be pursued, as are permissible in the collection of ordinary debts. In cases of insolvency of the individual, the indebtedness to the State for a license tax may be given priority of payment; a very summary proceeding may be devised for reducing the license tax to judgment, and securing payment by a levy upon the goods of the individual;2 all these ordinary and special remedies, and others of a like character, might well be provided, but to make it illegal to pursue a trade or engage in an occupation, until the tax is paid, is clearly in violation of those fundamental principles of civil liberty, which are recognized and guaranteed by all constitutional governments. The State may make the payment of taxes generally, or of poll tax in particular, a condition precedent to the exercise of the right of suffrage, for that is generally conceded by all constitutional authorities to be a privilege, and not a natural right. But the pursuit of an employment or business is a natural right, which exists independently of State authority, and can only be abridged by the exercise of the police power of the State, in the imposition of those restrictions and burdens which are necessary to prevent, in the prosecution of the trade or business, the infliction of injury upon others. The collection of a tax does not come within the exercise of police power as a prohibitory measure.

Another important question, in connection with licenses, is the nature of the right or privilege acquired by a license, strictly so called. A license tax, as a tax, confers no right of any kind; it simply lays a burden upon an occupation, and creates the duty to pay the tax. But when the license fee is exacted in the exercise of the police power of the State, does its payment give to the owner of the license an irrevocable right to pursue the trade or occupation, subject to no further restrictions by the State? The question has assumed a practical form in determining the effect of the passage of a

law, prohibiting the sale of intoxicating liquor, upon the licenses to sell, that have been previously granted, and the time for which they were given has not expired. Can the State, after granting a license to sell intoxicating liquors for one year, during that year revoke the license by prohibiting the sale altogether? The answer must depend upon the nature of the right acquired by the license. It has been repeatedly held that a subsequent prohibition law revokes all outstanding licenses, whatever damage might result to those who, relying upon the license, as giving the right to sell during the year, have incurred obligations and expenses, for which they cannot secure any proper reimbursement except in the continued enjoyment of the license. But, however great a hardship the revocation of the license may happen to be in particular cases, since the license is an authority to do what is otherwise prohibited, and the issue of the license is one mode of exercise of the police power; if the occupation or trade can be prohibited under the constitutional limitations, because of the injury done to the public in its prosecution, the license must be held to have been given and accepted, subject always to the constant exercise of the police power in the interest of the public, the right to the exercise of which can never be bartered away by any legislative enactment. The Court of Appeals of New York gave utterance to the following language, in explaining the right to revoke licenses:—

"These licenses to sell liquors are not contracts between the State and the person licensed, giving the latter vested rights, protected on general principles and by the constitution of the United States against subsequent legislation, nor are they property in any legal or constitutional sense. They have neither the qualities of a contract nor of property, but are merely temporary permits to do what otherwise would be an offense against a general law. They form a portion of the internal police system of the State; are issued in the exercise of its police powers, and are subject to the direction of the State government, which may modify, revoke or continue them as it may deem fit. If the legislature of 1857 had declared that licenses under it should be irrevocable (which it does not, but by its very terms they are revocable), the legislatures of subsequent years would not have been bound by the declaration. The necessary powers of the legislature over all subjects of internal police, being a part of the general grant of legislative power given by the constitution, cannot be sold, given away, or relinquished. Irrevocable grants of property and franchises may be made, if they do not impair the supreme authority to make laws for the right government of the State; but no one legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police."[1]

It is also very clear that, if the imposition of a restrictive license is conceded to be constitutional, the government has the power to determine what persons, and how many, shall enjoy the privilege of a license; and one who is denied that privilege cannot claim that his constitutional rights have been thereby infringed.[1]

By the same course of reasoning is it justified, by subsequent laws, to subject the licensed occupation to further restrictions. Thus it was held that the grant of a license does not prevent the State from prohibiting by a later law the sale of liquor on certain specified days,[2] or from prohibiting licensed saloons being open after a certain hour in the night,[3] or from exacting an additional license tax.[4]

[Back to Table of Contents]

§ 120.

Prohibition Of Occupations In General.[5] —

If the police regulation of trades and occupations cannot be instituted and enforced, except so far as a trade or occupation is harmful or threatens to be harmful in any way to the public, however slight the restraint may be; so much the more necessary must it be to confine the exercise of the police power to the prevention of the injuries with which the public is threatened by the prosecution of a calling, when the law undertakes to deny altogether the right to pursue the calling or profession. In proportion to the severity or extent of the police control must the strict observance of the constitutional limitations upon police power be required. There is no easier or more tempting opportunity for the practice of tyranny than in the police control of occupations. Good and bad motives often combine to accomplish this kind of tyranny. The zeal of the reformer, as well as cupidity and self-interest, must alike be guarded against. Both are apt to prompt the employment of means, to attain the end desired, which the constitution prohibits.

It has been so often explained and stated, that the police power must, when exerted in any direction, be confined to the imposition of those restrictions and burdens which are necessary to promote the general welfare, in other words to prevent the infliction of a public injury, that it seems to be an unpardonable reiteration to make any further reference to it. But the principle thus enunciated is the key to every problem arising out of the exercise of police power. Applied to the question of prohibition of trades and occupations, it declares unwarranted by the constitution any law which prohibits altogether an occupation, the prosecution of which does not necessarily, and because of its unenviable character, work an injury to the public. It is not sufficient that the public sustains harm from a certain trade or employment, as it is conducted by some who are engaged in it. Nor is it sufficient that all remedies for the prevention of the evil prove defective, which fall short of total prohibition. Because many men engaged in the calling persist in so conducting the business that the public suffer, and their actions cannot otherwise be effectually controlled, is no justification of a law which prohibits an honest man from conducting the business in such a manner as not to inflict injury upon the public. In order to prohibit the prosecution of a trade altogether, the injury to the public, which furnishes the justification for such a law, must proceed from the inherent character of the business. Where it is possible to conduct the business without harm to the public, all sorts of police regulations may be instituted, which may tend to suppress the evil. Licenses may be required, the most rigid system of police inspection may be established, and heavy penalties may be imposed for the infractions of the law; but if the business is not inherently harmful, the prosecution of it cannot rightfully be prohibited to one who will conduct the business in a proper and circumspect manner. Such an one would “be deprived of his liberty” without due process of law.

As it was said by the Supreme Court of the United States in one case,1 by Justice Bradley:—

"The right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase, 'pursuit of happiness,' in the Declaration of Independence, which commenced with the fundamental proposition that 'all men are created equal, that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness.' This right is a large ingredient in the civil liberty of the citizen." * * *

"If it does not abridge the privileges and immunities of a citizen of the United States to prohibit him from pursuing his chosen calling, and giving to others the exclusive right of pursuing it, it certainly does deprive him (to a certain extent) of his liberty; for it takes from him the freedom of adopting and following the pursuit which he prefers; which, as already intimated, is a material part of the liberty of the citizen."

So, also, in another case, the same court said,1 through Mr. Justice Matthews:—

"But the fundamental rights to life, liberty and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth 'may be a government of laws, and not of men.' For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to me intolerable in any country where freedom prevails, as being the essence of slavery itself."

I add two quotations from decisions of the New York Court of Appeals, in the same strain. In the case of In re Jacobs,2 Judge Earle said:—

"So, too, one may be deprived of his liberty, and his constitutional rights thereto violated, without the actual imprisonment or restraint of his person. Liberty, in its broad sense, as understood in this country, means the right, not only of freedom from actual servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation. All laws, therefore, which impair or trammel these rights, which limit one in his choice of a trade or profession, or confine him to work or live in a specified locality, or exclude him from his own house, or restrain his otherwise lawful movements (except as such laws may be passed in the exercise by the legislature of the police power, which will be noticed later), are infringements upon his fundamental rights of liberty, which are under constitutional protection."

And, again, in the case of the People *v.* Marx,1 Judge Rapallo, speaking of the inalienable rights of man under American constitutional limitations, said:—

"Among these, no proposition is now more firmly settled than that it is one of the fundamental rights and privileges of every American citizen to adopt and follow such lawful industrial pursuits, not injurious to the community, as he may see fit. The term 'liberty,' as protected by the constitution, is not cramped into mere freedom from physical restraint of the person of the citizen as by incarceration, but it is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare."

With this understanding of the constitutional limitations upon the police control of employments, it is not difficult to test the constitutionality of the various laws enacted in different States, which prohibit the prosecution of certain trades and professions.

[Back to Table of Contents]

§ 121.

Prohibition Of Trade In Vice—Social Evil, Gambling, Horse-racing.—

It has been maintained in a previous section,2 that the police power does not extend to the punishment of vice. No law can make vice a crime, unless it becomes by its consequence a trespass upon the rights of the public. But while this may be true, no man can claim the right to make a trade of vice. A business that panders to vice may and should be strenuously prohibited, if possible. Fornication is a most grievous and common vice. Under this view of the limitations of police power, it could not be made a punishable offense, although it would be commendable as well as permissible to prohibit the keeping of houses of ill-fame.1 Gambling of every kind is an evil, a vice, which cannot consistently be punished, except indirectly by a refusal of the courts to enforce gambling contracts;2 but the State may prohibit and punish the keeping of gambling houses, and lotteries, and the sale of lottery tickets.3 And it is the same in respect to every vice. Vice, as vice, is not subject to police regulation; but a business may always be prohibited, whose object is to furnish means for the indulgence of a vicious propensity or desire.

I have left unchanged the foregoing text of this section which appeared in the first edition on page 291 as a part of section 102, notwithstanding the fact that this distinction between crime and vice as the proper subjects of police regulation has not been indorsed by the courts, as I have fully set it forth in a preceding section of the present edition.1 And I do so because the adverse decisions have not convinced me that the distinction is unsound. The position of the text has been fully sustained, however, as to the right of the State to prohibit all trades which pander to vice. And I have added a number of cases, which illustrate the power of the legislature to prohibit the vicious trades, which has been mentioned above. Some new phases of such prohibitions deserve special mention. For example, in the effort to stamp out the vice of gambling, not only have book-making and pool-selling been included within the list of prohibited occupations;2 but even horse-racing has been prohibited, except as allowed by the act; and the prohibition has been sustained as a constitutional exercise of the police power.3 And in many of the States the keeping of what are known as bucket-shops, wherein people of small means are provided with the means of engaging in option dealing, has been declared to be a criminal misdemeanor, without any successful attack upon the constitutionality of the statute.4

[Back to Table of Contents]

§ 122.

Prohibition Of Trades For The Prevention Of Fraud—Adulterations Of Goods—Harmful Or Dangerous Goods—Prohibition Of Sale Of Oleomargarine.—

Fraud is a trespass upon the rights of others, and may, therefore, always be punished. When, therefore, a business consists necessarily in the perpetration of a fraud, the business may be prohibited; although fraud furnishes no justification for the prohibition of a business, which is not necessarily fraudulent, but which only affords abundant facilities for its commission. Thus it has been held within the constitutional limitation of the power of a State legislature to prohibit the sale of adulterated milk, even though the adulteration is made with harmless materials, such as pure water.1 It may be said that a perfectly *bona fide* sale may be made of adulterated milk, but the position is hardly sustainable. Adulteration is essentially fraudulent, and serves no good purpose; and the sale of the adulterated article of food may be rightfully prohibited, although it produces no unwholesome effect. Sugars are now very commonly adulterated by the use of a harmless substance called glucose. There can be no doubt of the power of the State to make the sale and manufacture of adulterated sugar a misdemeanor; but the great difficulty, that is experienced in detecting and suppressing this mode of adulteration, would not justify the absolute prohibition of the sale and manufacture of sugars.

A still stronger ground for the total prohibition of a trade or business is when the thing offered for sale is in some way injurious or unwholesome. It is not enough that the thing may become harmful, when put to a wrong use. It must be in itself harmful, and incapable of a harmless use. Poisonous drugs are valuable, when properly used, but they may work serious injuries, by being improperly used, even to the extent of destroying life. But it would hardly be claimed that, on that account, their sale could be prohibited altogether. Safeguards of every kind can be thrown around the sale of them, so that damage will not be sustained from an improper use of them, but that is the limit of the police control of the trade. Thus, for example, opium is a very harmful drug, when improperly used, and it is all the more dangerous because the power of resistance diminishes rapidly in proportion to the growth of the habit of taking it as a stimulant; and a miserable, degraded death is the usual end. An opium eater or smoker not only brings down ruin upon himself, but inflicts misery upon all who stand in more or less intimate relation with him. The habit is a most dangerous vice. But, on the other hand, opium is a very useful, and an indispensable drug. Many a poor sufferer has had his descent to the grave made easy and painless by the judicious use of this drug. Shall the sale of opium be prohibited altogether, simply because some men are apt to misuse it to their own injury? The law can prohibit the keeping of houses where those who are addicted to the opium habit are entertained with the opium pipe; the law may subject the sale of opium to such regulations as may be calculated to diminish the temptation to acquire this evil habit; but the sale of the drug

for proper purposes cannot be prohibited.1 It is possible that the sale of opium or other poisonous drugs may be prohibited to all except those who, like physicians and druggists, furnish in their professional character a safe guaranty, that no improper use shall be made of them, and to others upon the prescription of a physician. But that is questionable. The sale of it can, of course, be prohibited to minors and to all who may be suffering from some form of dementia, and to confirmed opium eaters. But it would seem to be taking away the free will of those, who are under the law confessedly capable of taking care of themselves, if the law were to prohibit the sale of opium to adults in general.

Where a thing may be put to a wrongful and injurious use, and yet may serve in some other way a useful purpose, the law may prohibit the sale of such things, in any case where the vendor represents them as fit for a use that is injurious, or merely knows that the purchaser expects to apply them to the injurious purpose. Thus the sale of diseased or spoiled meats or other food, as food, intending or expecting that the purchaser is to make use of them as food, may be prohibited. So, also, the sale of milk which comes from cows fed in whole or in part upon still slops, may be prohibited if it is true that such milk is unwholesome as human food.1 In the same manner a law was held to be constitutional, which prohibited the sale of illuminating oil which ignited below a certain heat.2 But it would be unconstitutional to prohibit altogether the sale of either of these things, if they could be employed in some other harmless and useful way. For example, the oil which was prohibited for illuminating purposes, may be very valuable and more or less harmless when used for lubricating purposes.

But the courts do not always make these distinctions. It has thus been held to be constitutional for the law to prohibit the manufacture or sale of vinegar which contains any artificial coloring matter, it matters not how harmless the matter; and even when there is no apparent intent to thereby commit fraud.3 In the New York vinegar case,1 referring to the argument that the law in question was an unwarranted interference with vested right, Judge Finch said: “Sometimes it (the argument) is pertinent and weighty, but in this case it is neither. It becomes the assertion of a vested right to color a food product so as to conceal or disguise its true or natural appearance; in plain words, a vested right to deceive the public.” In the Ohio case,2 sustaining a similar statute, prohibiting the manufacture and sale of vinegar, when artificial coloring matter is used in its preparation, the court say:—

“It is claimed that the primary object of using roasted malt is to give aroma and flavor to the vinegar, and that color is simply an incident to the process adopted in attaining the primary end, and hence that the giving of color in this way cannot be said to come within the meaning of the statute. But the evidence tends to show that the primary object was to give color. His (the defendant’s) purpose in using the roasted malt was a question of fact, to be determined by the court trying the case. His statement as to his purpose cannot control the court, if, in view of all the evidence, the court is satisfied that his real and principal purpose was to give color to the vinegar. Again, if the primary object was to give aroma and flavor, still the process adopted for this purpose was an artificial one. Distilled vinegar, as is that of the defendant, has no such aroma. It is given, if at all, by the artificial method of running the distillation through roasted malt, before its acetification, and artificial coloring is one of the principal results; and

in such case it is not material whether color or aroma was the primary object both being attained by artificial means. The process adds no substantial ingredients to the vinegar, for neither aroma, flavor nor color can be said to be substantial ingredients of any product. They are not susceptible of analysis, and are merely perceived by the aid of the senses. * * * The construction asked to be given this statute would permit a manufacturer to run distilled vinegar through roasted apples, and, by thereby imparting to it the color and aroma of cider vinegar, sell it in the market as such. And this, we understand, was claimed in the court below. But the purpose of this statute was, we think, to protect the public against such deceptions. Much is claimed from the fact that it was admitted on the trial that the vinegar of the defendant was wholesome, and that he did not intend to deceive any one by using the roasted malt, and labeling and selling his product as 'malt vinegar.' But this is wholly immaterial. It matters not what his intentions may have been. The tendency of such devices is to deceive the public, and the statute was enacted to afford it protection therefrom. Such a statute is clearly within the proper excercise of the police power of the State. Every one has the right to distinguish for himself what an article of food is, and have the means of judging for himself its quality and value."

So far as these cases merely undertake to prevent the use of artificial coloring matter in the manufacture of vinegar from low wines, formed from fermented grain, in order to give to such vinegar the color of vinegar formed by the natural process of fermentation of cider, they are easily justified on the principle, set forth in another place in the present section, that adulterations are essentially fraudulent. But the ruling in these cases cannot be extended, so as to include in the scope of their constitutional justification, laws which prohibit the use of artificial coloring matter, even though there is no opportunity to thereby palm off the product for another article, and the motive is simply to give it a more pleasing appearance. Many articles of foods are artificially colored, for example, butter, and whisky; but there is no intention to deceive, unless it is deception merely to give an article of manufacture a more agreeable color than what it naturally possesses. These cases must not be taken as authorities for justifying prohibition of the innocent coloring of products, when it is not done to make them resemble something else.[1]

These principles have lately been presented for consideration and review in connection with laws prohibiting the manufacture and sale of a substance, called oleomargarine, which resembles butter, and is intended to be used instead, and to supply the place in trade, of the dairy product. It is manufactured out of certain fatty deposits of the cow, which contain the same chemical properties as butter, varying only in degree. In New York and Missouri, and perhaps in other States, laws have been enacted, prohibiting absolutely the sale and manufacture of the oleomargarine. Although some attempt has been made to show that this butter substitute is unwholesome as food, it seems now to be established by the most thorough chemical analyses, that there is no unwholesome ingredient in unadulterated oleomargarine. If it were shown to be unwholesome as food, its sale for the purpose of human consumption could without doubt be prohibited. But the only valid objection to its sale is the close resemblance to genuine butter, and the consequent opportunity for the perpetration of fraud. And this was the sole ground upon which the constitutionality of the law was sustained by the Supreme Court of Missouri.[2]

But it is plain from the foregoing principles, that a total prohibition of the sale of a thing cannot be justified on any such grounds. The sale must be necessarily fraudulent, in order to admit of its absolute prohibition. The law, therefore, which prohibits the sale of oleomargarine, granting that it is a wholesome article of food, is unconstitutional, and so it is decided by the New York Court of Appeals, in considering the validity of the New York statute.1 In the United States Circuit Court, the constitutionality of the Missouri statute was disputed in a petition by the party to the cause, who prayed for the intervention of the United States courts to prevent the enforcement of the law. The petition was denied, on the ground that the United States court has no jurisdiction; but in delivering the opinion of the court, Justice Miller expressed the opinion that the law was in violation of the constitution of Missouri.2

The practice of deception in the sale of the oleomargarine may be made punishable as a misdemeanor, and the law may require, as in Ohio, the oleomargarine to be put up for sale in packages on which shall be distinctly and durably painted, stamped, or marked, the name of each article used or entering into the composition of such substance.3 A law has lately been proposed in New York, by which every one dealing in oleomargarine, is required to put up a sign to that effect, and in the manufacture of the substance it is required to be so colored that it may be readily distinguished from pure butter. There can be no doubt as to the constitutionality of such laws, for their only effect is the prevention of fraud. They do not interfere with the honest sale of a wholesome article of food.

The later authorities, however, all tend to support the Missouri view of the constitutionality of laws, which prohibit altogether the sale of oleomargarine. In most of the States, the regulations in accordance with the text, go no farther than to prevent fraud and deception in the sale of the product for genuine butter, either by requiring the oleomargarine to be artificially colored, so as to be distinguishable from butter, or by requiring the packages to be stamped with the name of oleomargarine, or posting up some notification that the grocer sells the tabooed article.1 But so far as I know, except in New York, laws prohibiting the total prohibition of the manufacture and sale of oleomargarine have been generally sustained, in some cases with a statement of the unlimited power of the legislatures in dealing with the matter that is in startling contrast with the freedom with which the courts have in other cases assumed to veto legislation, because it was unreasonable and for that reason in violation of the constitution. Thus the Pennsylvania statute, prohibiting the manufacture and sale of oleomargarine, was sustained2 with this remarkable statement of the omnipotence of the legislature in the regulation of the matter:—

“The mere fact that experts may pronounce a manufactured article intended for food to be wholesome or harmless does not render it incompetent for the legislature to prohibit the manufacture and sale of the article. The test of the reasonableness of a police regulation prohibiting the making and vending of a particular article of food is not alone whether it is in part unwholesome and injurious. If an article of food is of such a character that few persons will eat it, knowing its real character; if, at the same time, it is of such a nature that it can be imposed upon the public as an article of food which is in common use, and against which there is no prejudice; and, if, in addition to this, there is probable ground for believing that the only way to protect the public

from being defrauded into the purchasing of the counterfeit article for the genuine is to prohibit altogether the manufacture and sale of the former—then we think such a prohibition may stand as a reasonable police regulation, although the article prohibited is in fact innocuous, and although its production might be found beneficial to the public, if in buying it they could distinguish it from the production of which it is an imitation."

The decision of the Pennsylvania court was sustained on appeal by the United States Supreme Court.1 In the trial court, evidence was offered to show that eleomargarine was an absolutely wholesome product; but it was refused admission. The opinion of the Supreme Court of the United States, was in part:—

"Whether the manufacture of eleomargarine, or imitation butter, of the kind described in the statute, is or may be conducted in such a way, or with such skill and secrecy, as to baffle ordinary inspection, or whether it involves such danger to the public health as to require, for the protection of the people, the entire suppression of the business, rather than its regulation in such manner as to permit the manufacture and sale of articles of that class that do not contain noxious ingredients, are questions of fact and of public policy which belong to the legislative department to determine. And as it does not appear upon the face of the statute, or from any facts of which the court may take judicial cognizance, that it infringes rights secured by the fundamental law, the legislative determination of those questions is conclusive upon the courts. It is not a part of their functions to conduct investigations of facts entering into questions of public policy merely, and to sustain or frustrate the legislative will, embodied in statutes, as they may happen to approve or disapprove its determination of such questions." * * * "The legislature of Pennsylvania, upon the fullest investigation, as we must conclusively presume, and upon reasonable grounds, as must be assumed from the records, has determined that the prohibition of the sale, or offering for sale, or having in possession to sell, for purposes of food, of any article manufactured out of oleaginous substances or compounds, other than those produced from unadulterated milk or cream from unadulterated milk, to take the place of butter produced from unadulterated milk or cream from unadulterated milk will promote the public health and prevent frauds in the sale of such articles. If all that can be said of this legislation is that it is unwise, or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine, as an article of food, their appeal must be to the legislature or to the ballot box, not to the judiciary. The latter cannot interfere without usurping powers committed to another department of government."

Other cases to the same effect are cited in the note below.1

On a line with the utterances of the Supreme Courts of the United States and Pennsylvania, just quoted, it has been maintained in one case,1 that the judgment of a town board of aldermen that a certain article of food is unwholesome, and that therefore the sale of it can be prohibited, is not open to inquiry in the ordinary courts. Notwithstanding the high authority to the contrary, it would seem to appear from the general trend of judicial opinion in other and analogous cases, that the scientific correctness of the judgment of the legislative body in such a case is a judicial question, and therefore subject to review by the courts; for in no other way can the

legislatures be kept within the limitations of the constitution. If it is only necessary for the legislature to pronounce a calling injurious to the public, in order to justify its prohibition, there is no limit to the police power of the government. Constitutional restrictions would exert no greater influence than disorganized public opinion; and absolutism, monarchical, aristocratic or democratic, according to the circumstances, would be the corner stone of such a government, at least in theory. The recognition of the rights of the minority would be only a matter of special grace and favor.

An important question, in this phase of police power, which will soon demand an explicit answer, is how far and in what manner the government may regulate and prohibit the manufacture and sale of dynamite and other compounds of nitro-glycerine. The deadly character of the composition; the ready opportunity which its portability and easy manufacture afford for its application to base and criminal uses; the ability of a few miscreants with a few pounds of it to endanger and perhaps destroy the lives of many people, demolish public and other buildings, and bring about a state of anarchy in general, all of which can be done with very little danger of detection; these considerations, if any, would most certainly justify the prohibition of the manufacture and sale of so dangerous an article. And yet a law would be unconstitutional which prohibited absolutely the manufacture and sale of dynamite and nitro-glycerine. For these powerful agencies are of great value and service in many legitimate trades and occupations. The business may be placed under the strictest police supervision; heavy penalties may be imposed upon those who knowingly sell these articles to persons to be used for criminal purposes; a heavy bond of indemnity may be required of each dealer, and only men of reputable character, under license, may be permitted to carry on the business: these regulations are all reasonable and constitutional, for they do not extend beyond the prevention of the evil which threatens the public. A total prohibition of the trade in dynamite would not only prevent the evil, but also prohibit the lawful use of a most valuable agency, and would therefore be unconstitutional.

[Back to Table of Contents]

§ 123.

Prohibition Of Ticket-brokerage—Ticket-scalping Prohibited And Punished.—

Of late years statutes have been enacted in several States, notably Indiana and Pennsylvania, which prohibit the sale of railroad tickets, except by the authorized agents of the railroads and the *bona fide* purchaser of an unused ticket or portion of a ticket, the object of the statutes being to put an end to the business of the so-called ticket "scalpers" or brokers; and the Pennsylvania statute makes it compulsory upon the railroad company to redeem an unused ticket or portion of a ticket. It has been held in both States that the law was constitutional.1 In both cases the law was justified as a measure for the prevention of fraud upon the railroads and upon purchasers. The preamble to the Pennsylvania statute was as follows: "Whereas numerous frauds have been practiced upon unsuspecting travelers by means of the sale by unauthorized persons of railway and other tickets, and also upon railroads and other corporations by the fraudulent use of tickets, in violation of the contract of their purchase," etc. It is not contended that the business of ticket brokerage is in itself of a fraudulent character. The business can be honestly conducted by an honest man. It is only claimed that in its prosecution the business presents manifold opportunities for the commission of fraud. As has already been stated, the police regulation of an employment may extend to any length that may be necessary for the prevention and suppression of fraud in its pursuit; but an honest man cannot be denied the privilege of conducting the business in an honest and lawful manner because dishonest men are in the habit of practicing gross and successful frauds upon those with whom they have dealings. If that were a justifiable ground for abolishing any business, many important, perhaps some of the most beneficial, employments and professions could be properly prohibited. There is no profession or employment that furnishes more abundant opportunities for the practice of frauds upon defenseless victims than does the profession of the law, and that profession has its ample proportion of knaves among its votaries, although the proportion is very much smaller than is popularly supposed. But it would be idle to assert that, because of the frequency of fraudulent practices among lawyers, the State could abolish the profession and forbid the practice of the law. There is no difference in principle between the two cases. The business of ticket brokerage does afford many opportunities for fraud and deceit, and it may on that account be placed under strict police surveillance. But the business serves a useful end, when honestly conducted, and the constitutional liberty of the ticket broker is violated when he is prohibited altogether from carrying on his business. The foregoing text of this section has been reproduced without change from the first edition, wherein it appeared on pages 292, 293. To my certain knowledge, in every subsequent case in which the constitutionality of such laws has been questioned, this argument has been presented against their constitutionality by the attorneys of the ticket-brokers. But with the exception of the recent New York case, to which reference will be made presently, the argument did not seem to impress the courts, and they sustained the constitutionality of the law.1 The Illinois statute

prohibited the sale of railroad tickets by any one but the authorized transportation agents, and the original purchaser of the ticket. The Minnesota court held the law to be constitutional as a regulation of an incident of the business of common carriers, which business is itself subject to police regulation. In this case, Judge Mitchell says:—

"That the transportation of passengers by common carriers is a proper subject of police regulation by the State is unquestioned; and, if a business itself is the subject of police regulation, then so are all its incidents and accessories. That the matter of the issue and transfer of tickets, as evidences of the contracts of the carriers, is an incident and accessory of the business, needs no argument."

"And where a business is a proper subject of the police power, the legislature may, in the exercise of that power, adopt any measures not in conflict with some provision of the constitution, that it sees fit, provided, only, they are such as have some relation to, and some tendency to accomplish, the desired end; and, if the measures adopted have such relation or tendency, the courts will never assume to determine whether they are wise, or the best that might have been adopted."

The New York statute against ticket scalping was very drastic in the penalties which it prescribed for a violation of the statute, the highest being imprisonment in the penitentiary. When a case under the law appeared on appeal before the Appellate Division of the Supreme Court of the First Department, the constitutionality of the act was sustained on the ground, that the ticket of a common carrier was not property in the constitutional sense, the right to alienate which was protected against statutory curtailment by the constitutional guaranties.[1] Judge Patterson, in this case, says:—

"The buying and selling of railroad tickets is nothing but the buying and selling of the evidence which entitles a person to transportation by a public carrier. The issuing of tickets is a feature of the carriers' business. The regulation and control of the business of a public carrier is originally with the sovereign power conferring the franchise upon that carrier, if it be a corporation, or of the State in which the business is carried on, if the carrier is not a corporation. If the exercise of that power of regulation and control prevents a third party from securing a personal advantage, which he calls his business, he is not deprived of any constitutional right."

And the same position is taken by the dissenting judges of the Court of Appeals,[2] when an appeal was taken to that court, adding the additional argument that the prohibition of the business of selling the tickets of common carriers by others than the duly authorized agents of the railroads and other common carriers, was a reasonable provision for preventing fraud upon travelers by making the common carriers and their agents the sole vendors of tickets. Says Judge Martin:—

"The real inquiry here presented is whether the legislature may provide that steamboat and railroad tickets shall not be sold by irresponsible or unknown persons, thus exposing travelers to fraud, and require them to be so sold that the companies issuing them shall be responsible to the traveler who purchases them. When properly considered it is obvious that the purpose and effect of this law was to require the sale

of passage tickets in a manner which would render the companies themselves responsible for the sale. While the statute forbids persons other than the companies or their duly constituted agents making such sales, still, its purpose was to compel the companies to sell their own tickets and thus become responsible.

* * * * * * * * * * *

"That the sale of tickets by brokers has long been a source of fraud, both upon the traveling public and the companies issuing them, is a matter of common knowledge, and of its existence there can be no doubt. Indeed, it is doubtful if the business would exist but for the profit derived from improper or fraudulent sales. The fraud of ticket brokers assumes various forms, such as changing tickets which are not transferable by the erasure of the name, the place of destination, or the date, and substituting others, and by otherwise changing the tickets, or by obliterating the dates so as to render their improper use possible. Moreover, the existence of such brokers incites the stealing of tickets, and encourages the employees of the companies in defrauding their employers by furnishing a market for stolen tickets and those not canceled by dishonest officers. That the sale of such tickets is a fraud upon both the carrier and the honest traveler cannot be successfully denied. Again, when a passenger loses his ticket, instead of its being restored to him, resort may at once be had to those agencies to realize upon it. Hardly a week passes when the public prints do not contain one or more accounts of the grossest fraud upon honest but unwary travelers, which would not occur but for their existence. Therefore, the existence of ticket brokers is a continual menace to both passengers and carriers. It tends to encourage forgery, larceny, the receipt and sale of stolen and fraudulent tickets, the perpetration of frauds upon travelers, and is clearly a disadvantage to the honest traveler as well as to the carrier. Hence, the necessity for this statute is obvious, and I think the legislature was wise in adopting it."

"While every person has a right to pursue, in a legitimate manner, any lawful calling he may select, and the State can neither compel him to adopt any particular calling nor prohibit his engaging in any legitimate business, still, it, in the exercise of its police power, is authorized to subject all occupations to such restraint as may be necessary to prevent their becoming harmful to the public, and where an occupation threatens public injury and its suppression is essential to the public welfare, the State may prevent its pursuit.[1]

"The State has a right to reasonably control the manner in which public corporations shall transact their business, and to protect the public against fraud. This statute does nothing more. Its effect is to require railroad and steamboat companies to sell their own tickets in a manner that will render them responsible to the purchaser for any fraud or mistake that may be perpetrated or may occur. The property and business of these companies is clothed with a public interest which makes them of public consequence, affecting the community at large; and hence, they may be controlled by any police regulation which is necessary to secure the public good.[2] It is, therefore, reasonable that the State may provide any preventive remedy necessary when the frequency of fraud or the difficulty in circumventing it is so great that no other means will prove efficacious. A regulation which is instituted for the purpose of preventing

fraud or injury to the public, and which tends to furnish such protection, is clearly constitutional. This proposition is sustained by numerous authorities in this State and elsewhere, and is an important element of the police power which is vested in the legislature.

"It seems clear that the judgment in this case should be upheld upon the grounds:—

"1. Railroad and steamboat tickets can in no proper sense be regarded as property in which third persons have any vested interest. They are mere tokens or evidences of a right to transportation in which even the traveler who has purchased one has but a special interest, and to which the companies have title and the ultimate right of possession.1

"2. The sale of railroad and steamboat tickets by persons other than the companies or their agents as a business ness is not an employment in which they have any unqualified right to engage. A ticket is a mere incident to the business of the companies in transporting passengers. Like a baggage check, it is merely a method adopted by them for the transaction of their own business. The ticket itself possesses none of the ordinary elements of property and cannot, without the consent of the companies, form the basis of a legitimate independent business. At most it is but an evidence of the arrangement between the companies and their passengers in which others have no lawful interest. No right to transfer is given, and generally, none is intended. To hold that every person has a constitutional right to interfere with the relations between passengers and carriers, which is superior to the control of the legislature, would result in extending the restraints imposed upon the lawmaking power much farther than they have hitherto been supposed to exist, and would be an interference with the power vested in the legislative branch of the State government that is wholly unwarranted. It seems to me that third persons have no constitutional right to interfere with the relations between the carrier and passenger by the purchase and sale without its consent of tickets issued by the former, and that to establish such a right would be unauthorized by any existing principle of constitutional law. It is true the act recognizes the right of third persons to make sales of passage tickets, but that right is a limited one and can be properly exercised only by an agent of one of the companies furnishing the traveler with the transportation for which the ticket is purchased. But it is to be observed that as such sales are to be made by one of the companies furnishing the transportation, the company making it becomes responsible to the passengers and other carriers for any fraud perpetrated by its agent, and is in harmony with the general purpose of the act."

The majority of the judges of the Court of Appeals, however, reversed the judgment of the Supreme Court, and held the act to be unconstitutional on two principal grounds: (1) Because the State has no right to prohibit altogether the carrying on of a business which is not inherently fraudulent, simply because some of those who are engaged therein have systematically practiced gross frauds upon others; and (2) because the act in question does not make the business of ticket brokerage unlawful, but makes it a monopoly, and vests such monopoly in the transportation companies of the State. The court also held that the argument, that a transportation ticket is not property in the constitutional sense, is not tenable. The importance of the principles of

constitutional law justifies me, I think, in giving space to the following lengthy quotation from the opinion of Chief Judge Parker, who pronounced judgment for the court.

Judge Parker said in part:—

"The statute that appellant insists is in derogation of the limitation placed upon the legislative power by the people, through the constitution of the State, reads as follows: 'Section 1. The Penal Code is hereby amended by inserting therein a new section, to be known as Section 615, to read as follows: Section 615. *Sale of passage tickets on vessels and railroads forbidden except by agents specially authorized.* No person shall issue or sell, or offer to sell, any passage ticket, or any instrument giving or purporting to give any right, either absolutely or upon any condition or contingency to a passage or conveyance upon any vessel or railway train, or a berth or stateroom in any vessel, unless he is an authorized agent of the owners or consignees of such vessels, or of the company running such train, except as allowed by Sections 616 and 622; and no person is deemed an authorized agent of such owners, consignees or company, within the meaning of the chapter, unless he has received authority in writing therefor, specifying the name of the company, line, vessel or railway for which he is authorized to act as agent, and the city, town or village, together with the street and street number, in which his office is kept, for the sale of tickets.'

" 'Section 2. Section six hundred and sixteen of the Penal Code is hereby amended so as to read as follows: Sec. 616. *Sale by authorized agents restricted.* No person, except as allowed in Section six hundred and twenty-two, shall ask, take or receive any money or valuable thing as a consideration for any passage or conveyance upon any vessel or railway train, or for the procurement of any ticket or instrument giving or purporting to give a right, either absolutely or upon a condition or contingency, to a passage or conveyance upon a vessel or railway train, or a berth or stateroom on a vessel, unless he is an authorized agent within the provisions of the last section; nor shall any person, as such agent, sell or offer to sell, any such ticket, instrument, berth or stateroom, or ask, take or receive any consideration for any such passage, conveyance, berth or stateroom, except at the office designated in his appointment, nor until he has been authorized to act as such agent according to the provisions of the last section, nor for a sum exceeding the price charged at the time of such sale by the company, owners or consignees of the vessel or railway mentioned in the ticket. Nothing in this section or chapter contained shall prevent the properly authorized agent of any transportation company from purchasing from the properly authorized agent of any other transportation company a ticket for a passenger to whom he may sell a ticket to travel over any part of the line for which he is the properly authorized agent, so as to enable such passenger to travel to the place or junction from which his ticket shall read.'

"The remaining portion of the section relates to the redemption of tickets purchased from an authorized agent of a railway company, under certain contingencies, and within certain periods of time, and is not in anywise involved in this appeal.

"Having observed how the statute reads, it will be well next to analyze it and see if we can find out what was intended to be accomplished, and is in fact accomplished, by the phraseology of the statute, in order that we may ascertain whether the statute is in contravention of any of the rights secured by the constitution to the citizen. It will be observed, in the first place, that it does not prohibit the sale of tickets absolutely, nor does it limit to the particular transportation company over whose route he desired to be conveyed, the right to sell tickets to the traveler. It may be said in passing that the last assertion is in conflict with the position taken by the learned judge who wrote the opinion of the appellate division, for he assumes that as only persons appointed agents can sell, the effect of the provision is that a corporation 'shall only sell through its agents, and is merely a declaration that the corporation itself was to sell its tickets.'

"The first section and the first part of the second section do restrict the sale of passage tickets to agents specially authorized by transportation companies, and if there was nothing else in the statute upon the subject, it would bear the construction put upon it, that its only effect is to confine the right to sell passage tickets of a corporation to that corporation itself, which can act only through agents; but between the opening and the closing sentences of the second section may be found the following: 'Nothing in this section or chapter contained shall prevent the properly authorized agent of any transportation company from purchasing from the properly authorized agent of any other transportation company a ticket for a passenger to whom he may sell a ticket to travel over any part of the line for which he is the properly authorized agent, so as to enable such passenger to travel to the place or junction from which his ticket shall read.' Thus we see that the moment a man becomes the agent of a transportation company he is by that designation authorized to buy tickets of any other transportation company in the United States or the world, and may sell such tickets to any person who applies for them. In the sale of tickets of the various transportation companies, other than those of the company of which he is an agent, he necessarily acts as a broker. He can buy the tickets and sell them again, making a profit that may perhaps depend more or less on the degree of competition between railroads in various parts of the country. Clearly, the agent of a transportation company, in the purchase and sale of tickets of foreign corporations, is not engaged in selling the passage tickets of the transportation company appointing him. It is not the sale of the tickets of his principal alone that the agent is thus engaged in; but when a transportation company appoints an agent to sell its tickets, then the State, by this statute, steps in and attempts to clothe him with the power which it takes from all other citizens to deal in the tickets of as many other transportation companies as he may be able to make satisfactory arrangements with.

"This leads us to note another interesting feature of this remarkable statute. The buying and selling of passage tickets is not abolished; it is only condemned where the seller has not authority from some one of the transportation companies to act as its agent. It has happened before that for the protection of the people the lawmaking power has provided for an examination for the purpose of ascertaining whether applicants possessed suitable qualifications as to character, intelligence and financial responsibility to fill certain positions of trust, or to engage in a business which might prove dangerous to the people in the hands of a person either incompetent or of bad character; but in no instance has it conferred a general and unlimited power of

appointment upon a class of persons or corporations wholly unconnected with the State government. It may possibly be that there was such a situation as would have justified an enactment placing some restrictions upon those engaged in the selling of passage tickets and prescribing penalties by way of fine or imprisonment for those who should break over such restraints. Our excise legislation affords an illustration. By its provisions all are permitted to sell liquor within certain limitations that apply to all citizens alike, and for the violation of the regulations of the traffic are provided certain penalties that are expected to assure to the public some measure of protection from non-law-abiding citizens engaged in the business. But this act simply turns over to the transportation companies the selection of those who are hereafter to be permitted to sell tickets. It imposes no restraints whatever upon the appointing power, nor upon the agents selected, other than that in the purchase of tickets he must confine himself to the properly authorized agents of the transportation companies. The business of buying and selling tickets, as to such agents, continues to be a legitimate business, but to all citizens other than those who may be selected by the transportation companies, the right to buy and sell tickets is denied, and an actual sale by them constitutes a felony. The act itself is silent as to the motive of its enactment by the legislature, and it contains no suggestion as to the public interests which its purpose is to subserve.

"Ticket brokerage as a business has been in existence for many years. It is a matter of common knowledge that at great agencies such as Cook's and Gaze's, tickets can be purchased over a great portion of the transportation routes of the world. Intending travelers in great numbers have gone to these agencies for advice as to choice of routes to be taken in contemplated journeys and to purchase the tickets for the trip, whether it should require days, or weeks or months to make it. The traveling public in large numbers have come to make use of the facilities afforded by such agencies, of which there are now very many. And Cook's and Gaze's are among the agencies that must go out of business in this State if this statute can live, unless some transportation company shall deem it wise to clothe them with the authority to act as its agents.

"It is asserted by counsel that the traveling public and the transportation companies have been so defrauded by the acts of the brokers in the selling of unused or alleged to be unused passage tickets, as to call for legislation of a protective character, of which this statute is the outcome. The tendency of the times undoubtedly is to rush to the legislature for a cure for all the grievances of citizens, whether real or imaginary, and many novel experiments in legislation are the result. But usually in case of wrongs penalties have been provided. It is novel legislation indeed that attempts to take away from all the people the right to conduct a given business because there are wrongdoers in it, from whose conduct the people suffer. But where in the statute is to be found the evidence that its purpose is to prevent fraud? 'In the title of the act,' answers counsel, and with that answer he has to be content. For while the act is entitled 'Frauds in the sale of passage tickets,' the body of the statute does not contain any reference to forged, altered, used or stolen tickets. The sale of such tickets is made a punishable offense under other sections of the Penal Code. The provisions of the act, therefore, have reference to the selling of valid tickets, regularly issued by a transportation company. Can the legislature declare such sales to be fraudulent, or prohibit them on the ground that it tends to prevent fraud? If the act prohibited is fraudulent, there can

be no doubt that the legislature, under its police power, may provide for its punishment; but whether it may, under such power, interdict the sale of a valid ticket by one person to another upon the pretext that fraud will thus be prevented, presents a very different question. I confess I am unable to see how such a sale defrauds a transportation company. If a transportation company sells a ticket from New York to San Francisco, it undertakes to carry the holder from one place to the other. It costs the company no more to carry one person than it does the other. How then can it be defrauded or in any way prejudiced by the transfer of such a ticket by the purchaser to another person? It is said that the prohibition of such a sale tends to protect the traveler from being defrauded. If it is a sale of a valid ticket, no fraud can possibly result, and if it is not a sale of a valid ticket, then the sale is fraudulent and is prohibited by other provisions of the Penal Code.

"Only one prop remains which it is pretended can support the weight of this statute, and that is, that the penal laws not having proved sufficiently efficacious to wholly prevent fraud, an emergency is presented which justifies the taking away from the general public the right to engage in the business of ticket selling.

"Counsel argue that the helpfulness of the ticket broker in securing to the traveling public the benefits of such competition was of such a fraudulent character as to wholly justify the legislation, and appeal to the decisions quoted from in support of such contention. But we pass for the present the subject of motive, to be again referred to when we come to consider whether, under the police power, the legislation can be justified. Whatever the legislature's motive, the fact is, that it has passed an act which does not declare ticket brokerage unlawful, for it allows any person who may be fortunate enough to secure an appointment as agent for a transportation company to engage in ticket brokerage; but the act does declare that if any person, other than an agent of a transportation company, undertakes to engage in the passenger ticket brokerage business he shall be guilty of a felony; in other words, that it is unlawful for all citizens of New York to engage in the buying and selling of passage tickets unless empowered to do so by the written appointment of a transportation company.

"Much has been said in argument with reference to this statute in a more agreeable vein, placing the statute in a somewhat more attractive form, but it is as well to go beneath the surface and get at the truth, which is that the statute was intended to and does, in fact, vest the control of the sale of passage tickets within this State, not only of transportation companies doing business in this State, but throughout the world, exclusively in the hands of such companies.

"The business of selling passage tickets continues, therefore, to be regarded as a lawful and legitimate business. Public policy is still declared to favor a business which recognizes the propriety of the middleman between the passenger and the transportation company, but the right to engage in it is denied to the general public.

"The question then is whether the organic law prohibits legislation of this character.

"Before referring to the provisions of the constitution that, it is confidently asserted, condemn such legislation, it may not be out of place to note that the granting of

monopolies or exclusive privileges to corporations or persons has been regarded as an invasion of the rights of others to follow a lawful calling and an infringement of personal liberty, from the times of the reigns of Elizabeth and James. The statute of 21 Jac., abolishing monopolies, has been from the time of its enactment regarded as a statutory landmark of English liberty, and that nation has jealously preserved it. It was a part of that inheritance which our fathers brought with them and incorporated into the organic law, to the end that the lawmaking power should be restrained from interference with it.

"It is not contended that the business of ticket brokerage is in itself of a fraudulent character. The business can be honestly conducted; it has been so conducted in the past by honest men engaged in it; and the most that is asserted is that there are some men engaged in the business who have imposed on the public. The same assertion can be made with equal truth of every business, trade and profession. Because some coal dealers and vendors in sugar cheat in weight, and dealers in paints and oils in measurements, and in tobacco in quality, it has not hitherto, we venture to say, been thought the proper remedy to make it a felony for persons to hereafter engage in such business, unless they shall have been duly appointed as agents by the corporations manufacturing or producing the product.

"Still another motive for this enactment is suggested, and that is that its real purpose is to enable transportation companies to compel others with which they may enter into pooling arrangements to preserve their agreement from secret violation, which is frequently the outcome under the present ticket brokerage system, which offers an avenue by which the weaker corporation to such an agreement can dispose of its tickets at a price lower than that agreed upon.

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"Again, it is said that ticket brokers enable the railroads to engage in unfair competition. This is accomplished by the sale to the broker by a competing railroad, at much less than the regular rates, of a block of tickets that the broker is enabled to sell to his customers, and this to a certain extent takes travel from its competitors. An opinion is cited in which the court in another jurisdiction denounces the ticket scalper for engaging in a business of this character, and pronounces such business fraudulent alike in its conception and operation; but we pass this opinion without other comment than to say whatever may be regarded as the law in other jurisdictions, in this one it is well established that the public welfare is best subserved by the encouragement of competition,1 and hence this so-called reason furnishes no support to the claim that this legislation was for the public good."

To one who, like myself, places so high a value, as a constitutional protection against legislative tyranny, upon the principle that a legislature cannot constitutionally prohibit a trade or business which is not inherently fraudulent, because great frauds are committed by some who are engaged in the business, or because the character of the business makes the practice of fraud easy and its detection difficult; it is a matter of great gratification that these later cases, in which the constitutionality of the ticket-scalping laws has been sustained, do not rest their judgment upon a denial of that

principle, although most of the opinions of the judges do refer to the commission of these frauds by unauthorized ticket agents as a justification for giving to the railroads and other common carriers the exclusive privilege of selling such tickets. Their chief ground for holding these laws to be constitutional is that a ticket is only a token, and not a piece of property which is the proper subject of general barter and sale; that it is merely evidence of a contract to carry the holder to his place of destination, and that its sale is merely an incident of the business of a common carrier, which can be exclusively given to agents of their own appointment, without infringing their constitutional right of any one else to engage in the business of selling the tickets, after they have been issued by the railroads. This argument is certainly a very strong one, if it be conceded that a ticket,—which is not expressly declared on its face to be non-transferable and which does not contain the name of the purchaser, who alone is entitled by the contract to make use of it;—in other words, that a general ticket, issued by a transportation company, is not property, whose free alienation *inter-vivos* is guaranteed by the constitution. But if this be denied, and such a ticket be held to be as much property in the constitutional sense as a note or bond, payable to bearer, there is nothing in the argument to sustain the constitutionality of the ticket-scalping law, in the face of the undoubted fact that the purpose of these laws is not so much the prevention of frauds upon the unsuspecting traveler, as the furtherance of the private interests of the railroads and other common carriers. I am inclined to believe that the policy of such laws is a part of the general policy of combinations of railroads in maintaining rates, and are designed to prevent some railroads from selling tickets through the ticket-brokers at a lower rate than the rate fixed by the combinations. As long as it is the policy of the law, not only to refuse aid in enforcing such combinations, but even to punish those who enter into such combinations, this would not furnish any constitutional justification for these laws. But, to recur to the argument that a ticket is not property; in the New York case, Judge Bartlett in his opinion says that the question, whether the purchaser of a ticket can be denied the right to sell it, was not before the court, but intimated that this question would be answered by him in the affirmative. But if the purchaser from the railroad could sell the ticket, why could not his vendee sell it too? So that we return to the original proposition, whether the business of selling transportation tickets, once issued by the companies, can be lawfully prohibited? It is clear that the railroads may issue tickets, as they do, which are non-transferable, and when their non-transferable character is stated on their face, no one but the original purchaser can make use of them. And if it is the policy of the transportation companies to issue that kind of ticket, they must take the measures necessary to secure their enforcement of that condition. There is no difference between a railroad ticket and any other license to make use of another's property. Unless the license is non-transferable, by the law or by express agreement of the parties, it is as much the proper subject of alienation as any more stable right of interest in another's property.

I have been drawn into a full discussion of these laws against ticket-scalping, because I believe that the Court of Appeals have, in deciding against their constitutionality, strengthened the constitutional barriers, not only against legislative interferences with the constitutional liberty in general, but also against the extension of the power of the legislature to create legal monopolies, or the increase of the powers of those already

existing, whose creation has been justified by the apparent necessity of choosing between government and private monopolies.[1]

[Back to Table of Contents]

§ 124.

Prohibition Of Sale Of Game Out Of Season—Prohibition Of Export Of Game.—

In a subsequent section2 it will be explained that laws have been passed in most of the States, which prohibit the shooting of wild game and the catching of certain fish during certain periods of the year; and in some cases laws have been passed, prohibiting the hunting of certain game, or the catching of certain fish, for a year or more. The object of these laws is the prevention of the extinction of the game by excessive hunting, and by hunting during the hatching and breeding seasons. The constitutional aspect of these laws will be discussed in the subsequent section. The simple prohibition of hunting and fishing during the prohibited season has not proven an effective protection. And for that reason, laws have been enacted in a number of the States, which prohibit absolutely the sale of game and fish during the closed season, and provide appropriate penalties for enforcing the law. These laws have been sustained as constitutional exercises of police power. In one case the constitutionality of the law was sustained, although it prohibited during the closed season the sale of quail which was killed outside of the State.1

Another common regulation, which is designed to prevent the extinction of wild game, is the prohibition of the consignment out of the State for sale of such wild game. And the regulations have been sustained, although they involve an apparent interference with interstate commerce.2 In Minnesota, a law prohibiting the consignment to a merchant for sale of any part of a deer, elk, moose, or caribou, except the head or skin, was sustained;3 while in California, a law was declared to be constitutional which prohibited the sale of any part of the deer.4 Notwithstanding the unusual character of these laws, their enactment can be constitutionally sustained, on the ground that the welfare of all is promoted by them, without imposing any unreasonable restraint upon the individual.

[Back to Table of Contents]

§ 125.

Prohibition Of The Liquor Trade.—

This phase of police supervision is not only the most common, but the moral and economical conditions, which induce its exercise, are so great and pressing, and the popular excitement attending all agitations against intemperance, like all popular agitations, is usually so little under the control of reason, that it is hard to obtain, from those who are attempting to form and mould public opinion, any approach to a dispassionate consideration of the constitutional limitations upon the police power of the State, in its application to the regulation and prohibition of the liquor trade. Drunkenness is distressingly common, notwithstanding the great increase in the number of those who practice and preach total abstinence from the use of intoxicating liquors; and the multitude of cases of misery and want, caused directly by this common vice, cry aloud for some measure whereby the evil of drunkenness may be banished from the earth. It is no wonder when the zealous reformer contemplates the careworn face of the drunkard's wife, and the rags of his children, that he appeals to the law-making power to enact any and all laws which seem to promise the banishment of drunkenness; forgetting, as it is very natural for him to do, since zealots are rarely possessed of a philosophical and judicial mind, that to make a living law, it must be demanded, and its enactment compelled, by an irresistible public opinion; and where the law in question does not have for its object the prevention or punishment of a trespass upon rights, it is impossible to obtain for it the enthusiastic and practically unanimous support, which is necessary to secure a proper enforcement of it. Furthermore, if in any community public opinion is so aroused into activity as to be able to secure the enforcement of a law, having for its object the prevention of a vice, the moral force of such a public opinion will be amply sufficient to suppress it. The temperance agitator does not usually dwell on these scientific objections to temperance laws, or if he does, he either gives to them a flat and unreasoning denial, which makes all further argument impossible, or he justifies the enactment of an otherwise useless law by the claim that the enactment would arouse public attention to the evils of drunkenness, and by making persistent, though unsuccessful, attempts to enforce the law, public opinion will be educated up to the point of giving the proper support to the law. Educate public opinion up to the point of giving proper support to the law! If there is one principle that the history of law and legislation teaches with unerring precision, it is, not only the utter futility as a corrective measure of a law, whose enactment is not the necessary and unavoidable resultant of the social forces, then at play in organized society, but also the great injury inflicted upon law in general by the enactment of laws before their time. Nothing so weakens the reverence for law, and diminishes its effectiveness as a restraint upon wrong and crime, as the passage of stillborn laws, laws which are dead letters before they have been promulgated to the people. And why are laws for the prevention or punishment of vice ineffectual? Because such a law cannot enlist in its cause the strong motive power of self-interest. I do not mean that it cannot be demonstrated that each individual in the community will be benefited by the effective control of drunkenness.

But I do mean that the people at large cannot be made to feel, sufficiently acutely, the necessity of enforcing these laws, in order to make them effective remedies for the suppression of the evil. A man sees a pick-pocket steal his neighbor's handkerchief, while on his way through the public streets. He will instantly, involuntarily, give the alarm, and probably would render what aid was necessary or possible, in securing the arrest of this offender against the laws of the country. The same man, a few steps further, sees another violating the law against the sale of intoxicating liquor; and although he may be an active member of some temperance organization, he will be sure to pass on his way, and say and do nothing to bring this offender to justice. Why this difference of action in the two cases? In the first case, the act was a trespass upon the right of property of another, and self-interest, through fear of a like trespass upon his own rights of property, prompted the man who saw the crime to aid in the arrest of the criminal. In the latter case, no man's rights were trampled upon; the unlawful act inflicted no direct damage upon the man who witnessed the violation of the law, and consequently self-interest did not impel him to activity in support of the law.

But these considerations constitute only philosophical objections to such laws, and can only be addressed to the legislative body, as reasons why they should not be passed. They do not enter into a consideration of the constitutionality of the laws after they have been enacted. If the constitution does not prohibit the enactment of these laws, the only obstacle in the way of their passage is the unwillingness of the legislators. The question to be answered is, therefore, are the laws for the regulation and prohibition of the liquor trade constitutional? The preceding sections of the present chapter contain an enunciation of all the principles of constitutional law, which are necessary to the solution of the present problem. But a recapitulation is necessary, before applying them to the particular case in question.

It has been demonstrated, and satisfactorily explained in its application to a sufficient number of parallel and similar cases, in order to lay it down as an invariable rule, that no trade can be subjected to police regulation of any kind, unless its prosecution involves some harm or injury to the public or to third persons, and in any case the regulation cannot extend beyond the evil which is to be restrained. It has also been maintained and, I think, satisfactorily established, that no trade can be prohibited altogether, unless the evil is inherent in the character of the trade, so that the trade, however conducted, and whatever may be the character of the person engaged in it, must necessarily produce injury upon the public or upon individual third persons. It has likewise been shown that, while vice, as vice, can never be the subject of criminal law, yet a trade, which has for its object or necessary consequence, the provision of means for the gratification of a vice, may be prohibited, and its prosecution made a criminal offense. These principles, if sustainable at all, must have an universal application. They admit of no exceptional cases. If the reader has given his assent to the truth of them, in their application to other cases of police regulation of employments, his inability to adhere to them, in their application to the police regulation of the liquor trade, indicates either a lack of courage to maintain his convictions in the face of popular clamor, or an obscuration of his judgment through his sympathetic emotions, which are aroused in considering the gigantic evil to be combated.

It has never been claimed that any one could be punished for drunkenness, unless he thrusts the fact upon the attention of the public, so that it offends the sensibilities of the community, and in consequence becomes a public offense. If a man displays his drunkenness on the public thoroughfares to the annoyance and inconvenience of the public, he can be punished therefor. But if he chooses to degrade himself by intoxication in the privacy of his own home or apartments, he commits no offense against the public, and is consequently not subject to police regulation. But the man who proposed to make a profit out of his proneness to drunkenness, would be guilty of a public wrong, and could be punished for it. It is perfectly reasonable for the law to prohibit the sale of liquor to minors, lunatics, persons under the influence of liquor and confirmed drunkards, and impose a penalty upon the dealer who knowingly does so. In very many of the States there are statutes in which it is provided, that whoever is injured by the wrongful acts of a drunken person may maintain an action for damages against the dealer in liquor who sold or gave the liquor which caused intoxication in whole or in part, where the intoxicated person was neither a confirmed drunkard, nor a minor, nor a lunatic, nor under the influence of liquor, when he purchased the liquor. This legislation has been frequently sustained by the courts in its broadest application, and, it is believed, has in no case been declared unconstitutional, although often contested.[1] So far as these statutes prohibit the sale of liquor to persons who, from their known weakness of character, may be expected to make an improper use of it to their own harm and the injury of others, and subject the dealer, who sells liquor to these classes of persons, to an action for the damages that third persons may have sustained from their drunken antics, it cannot be doubted that the statutes are constitutional. These persons, who are laboring under some mental or other infirmity which renders them unable to take care of themselves, can very properly be placed under the guardianship of the State, if not in all cases for their own benefit, at least for the protection of the public; and where a dealer in intoxicating liquors sells to such an one, in violation of the statutes, he does a wrongful thing, an act prohibited by a constitutional law, and he may therefore be held responsible for every damage flowing from his wrongful act, which might reasonably have been anticipated. But when the statutes go farther and make the dealer responsible for every wrongful act committed by any and every person while in a state of intoxication, whose intoxication was caused by the liquor which the dealer had sold, whether the dealer knew of his aptitude to intoxication or not, they can only be justified on the principle that the prosecution of the liquor trade is unlawful in itself, and the constitutionality of such laws must depend upon the constitutionality of laws for the prohibition of the liquor trade in general. For no one can be held responsible for damage, flowing consequentially from an act of his, unless that act is unlawful in itself, or he has done it in an unlawful manner. If the sale of liquor is a lawful occupation he can not be held for a damage that is not the result of his failure to conduct the business in a lawful manner, and he cannot be said to have conducted a lawful business in an unlawful manner, when he sells liquor to one who may not reasonably be expected to become intoxicated.

Is then the absolute prohibition of the liquor trade a constitutional exercise of legislative authority under the ordinary constitutional limitations? It may be stated that the decisions of the courts, in different parts of the country, have very generally sustained laws for the prohibition of the sale of intoxicating liquors, in any manner,

form or bulk whatever, and on the ground that the trade works an injury to society, and may, therefore, be prohibited.1

The citations and quotations may be continued without end, but the invariable argument is that the liquor trade has, following in its train, certain evils, which would not exist, if the trade were prohibited altogether; consequently, the trade may rightfully be prohibited. If the necessary consequence of the sale of liquor was the intoxication of the purchaser, because the liquor could not be used without this or other injury to the person using it and to others, then the trade may be prohibited in accordance with the principles, which have been established in preceding sections of this chapter, in application to other employments. In such a case, the trade would be essentially injurious to the public. But it does not necessarily follow that the sale of the liquor will cause the intoxication of the purchaser. The number of those who are likely to become intoxicated by the liquor they purchase is very small, in comparison with the thousands who buy and use it in moderation, without ever approaching the state of intoxication. We cannot say, therefore, that the sale of liquor necessarily causes intoxication. On the contrary, the facts establish the truth of the statement that the cases, in which the sale of liquor is followed by intoxication, constitute the exception to the general rule. The liquor dealer may, and probably in the majority of cases does, become responsible for the intoxication that follows a sale in these exceptional cases, by knowingly selling liquor to one who is intoxicated at the time, or is likely to become intoxicated, and he can undoubtedly be punished for such a wrong against society; but the main and proximate cause of these cases of intoxication is the weakness of the purchaser, against which no law probably can furnish for him any effective protection.

But it is often urged as a justification of prohibition that even a moderate use of intoxicating liquor is injurious to the health. A great many people believe this to be true, and possibly it is. But the majority of people of the present generation think differently. Thousands maintain that it is a harmless indulgence, and as many more declare it to be positively beneficial. Those who are opposed to the use of intoxicating liquors, except for medicinal purposes, are convinced that these people are wrong; but they are equally entitled to their own opinions, and it would be just as much an act of tyranny to compel them to abandon their ideas and practices, in conformity with the total abstinent's views of what is good for them, as it would be to pass a law prohibiting the eating of hot bread, because the majority of the people believe it to be injurious to the health. It is true that a man may be prohibited from doing that which will work an injury to his offspring by the inheritance of diseases caused by the prohibited practice. While it is probably true that intoxicating liquor, like any other stimulant, will produce a more or less lasting effect upon the constitution of the person addicted to its use, it is by no means a demonstrated fact that its use is the cause of any constitutional disease. Whatever injury can be attributed to the moderate use of liquor, so far at least as our present knowledge extends, is functional and not constitutional. If these reasons be well founded, then the liquor trade is not necessarily injurious, in a legal sense, to the public; and where injury does result, it is either caused by the shortcomings of the purchaser, without any participation in the wrong by the seller, as where he does not know, and cannot be supposed to know, that intoxication will very likely follow the sale; or the responsibility may be laid at the

door of the seller, when he knowingly sells to one who is likely to make an improper use of it. The seller may in the latter case be punished, and his right to pursue the trade thereafter may be taken away altogether, as a penalty for his violation of the law in this regard. But the liquor trade can not, for these reasons, be prohibited altogether, if it be true that no trade can be prohibited entirely, unless its prosecution is essentially and necessarily injurious to the public. Even the prohibition of saloons, that is, where intoxicating liquor is sold and served, to be drunk on the premises, cannot be justified on these grounds.1

It is quite common for the legislature to pass laws prohibiting the sale of intoxicating liquors in the neighborhood of schools, colleges, and lunatic asylums, and these laws have uniformly been sustained as constitutional, unless in some of the States they have come under the constitutional prohibition for being special laws, the right to enact which is taken away from the legislature by some of the constitutions.1 Surely, if in any case prohibition laws can be sustained on principle, their enactment would find ample justification in the removal of temptation to drink from those who, on account of their infancy or mental deficiencies, are not as able to maintain an effective resistance without this protection. But if the principles heretofore developed be at all reliable, as a guide in search of the constitutional limitations upon the police control of trades and employments, these special prohibitory laws are subject to the same constitutional objection, that the trade which they prohibit is not essentially and necessarily harmful to society, even under the peculiar circumstances which furnish a special reason for the enactment of the law.

It has been stated that the reasons usually assigned for the enactment of prohibitory laws, viz.: the prevention of drunkenness, will not satisfy the constitutional requirements even in the prohibition of drinking saloons, although most of the drunkenness from which the State suffers is caused by the existence of taverns or saloons, where liquor is sold to be drunk on the premises. For it would be manifestly untrue to assert that every frequenter of a saloon became intoxicated, and during intoxication did more or less damage to the public, or to third persons: consequently the sale of liquor in a saloon does not necessarily bring about the intoxication of the buyer or of his friends. But there is another, and an all-sufficient, reason for the prohibition of drinking saloons, if the legislature should deem it expedient to prohibit them. It is that they constitute the places of meeting for all the more or less disreputable and dangerous classes of the community, and breaches of the peace of a more or less serious character almost invariably occur in bar-rooms. It is true that there are many comparatively quiet saloons, where men of good social standing resort, and which are to be distinguished from the low groggeries where the vicious and the criminal classes congregate; but the keeping of a drinking saloon cannot be conducted so that public disorders cannot possibly occur, and some of the most distressing breaches of the peace, resulting in the death of one or more, have occurred in this better class of saloons. The suppression and control of the public disorders caused by the keeping of saloons constitute a heavy burden upon the taxpayer, and the cause of them may be removed by a prohibitory law, or restrained and restricted in number by the imposition of a high license, according as it may seem best to the law-making power.

As a matter of course, if the absolute prohibition of drinking saloons is constitutional, it would be lawful to subject them to more or less strict police regulations, where the regulations have for their reasonable object the prevention of some special evil which the prosecution of the trade threatens to the public. Thus it has been held reasonable to compel the closing of saloons on Sunday,1 not only because the pursuit of the business would be a violation of the ordinary Sunday laws,2 but also because there is increased danger on that day of breaches of the peace in bar-rooms, on account of the idleness of those persons who are most likely to frequent such places. It has also been held to be reasonable, for similar reasons, to prohibit the sale of liquors on primary and other election days;3 on court, show and fair days;4 to compel the saloons to be closed at a certain hour in the night;5 and in one case it was maintained to be lawful for the legislature to authorize the Board of Police Commissioners to order all saloons to be closed, "temporarily," whenever in their judgment the public peace required it.1 It has also been declared to be reasonable to prohibit the erection of screens and shutters before places in which liquors are sold.2

This, therefore, is the conclusion reached after a careful consideration of all the constitutional reasons for and against the prohibition of the liquor trade: the prohibition of the manufacture and sale of spirituous and intoxicating liquors is unconstitutional, unless it is confined to the prohibition of drinking saloons, and the prohibition of the sale of liquor to minors, lunatics, confirmed drunkards, and persons in a state of intoxication. As has already been explained, there is an almost unbroken array of judicial opinions against this position, and there is not any reasonable likelihood that there will be any immediate revulsion in the opinions of the courts. But it is the duty of a constitutional jurist to press his views of constitutional law upon the attention of the legal world, even though they place him in opposition to the current of authority.

[Back to Table of Contents]

§ 126.

Police Control Of Employments In Respect To Locality.3 —

Another more or less common mode of police regulation of employments is the determination of the localities, in which the trade will be allowed. Very many trades are beneficial to society in general, and it would be unconstitutional to prohibit them altogether; and yet they may be subjected to whatever reasonable regulations may be needed to avert or prevent some special danger, which is threatened by the prosecution of them. Very many instances of such regulations have been given in preceding sections of this chapter. A trade may be highly dangerous or offensive to the people, when prosecuted in one locality, while the danger or offensiveness may be dissipated altogether or considerably abated, if it is carried on in a different community. Machine shops and the cotton trade may be cited as a good example of trades, which are more dangerous in one locality than in some other; while a soap factory or a tannery may be referred to as illustrating cases, in which offensiveness would constitute a serious objection to their prosecution in the residential portion of a city.1 It would not constitute any unreasonable interference with the right to pursue without restraint any lawful trade or employment, if the legislative authority should require the prosecution of such trades and occupations within a certain area of a populous city, and prohibit them outside of such area. This power has been often exercised, and but rarely questioned. It has been held reasonable to prohibit the keeping of slaughter-houses in certain parts of the city,2 and to exclude hacks from certain streets.3

Other cases of justifiable limitation of certain trades to a particular designated locality are suggested by some of the cases. It has thus been held to be constitutional to confine dairies within a certain territory;4 and to prohibit liquor saloons in residential portions of a city;5 and the sale of cigarettes within two hundred feet of a school house.6 But the prohibition as to locality must be reasonable, in order that it may not offend the constitutional limitations. If the area, in which the prosecution of a useful trade is prohibited, is so extensive that it amounts to a practical prohibition of the trade, the regulation will be unconstitutional. Thus it has been held to be unreasonable to prohibit the establishment of a steam engine in the city.1

The nature of the business must also be such as to justify restriction as to locality. If the business is of an inoffensive character, and its prosecution does not involve the creation of a nuisance, a law is unconstitutional which undertakes to confine it to a certain locality. For example, one of the manifestations of popular hostility to the Chinese took the form in California of ordinances, which limited laundries to certain blocks and sections of the town or city. The Supreme Court of California joined with the United States court, in pronouncing such ordinances to be an unconstitutional interference with personal liberty.2

In Missouri, a State law which authorized cities possessing a certain population to prohibit the establishment and maintenance of all kinds of business on a boulevard, or other particular street or avenue, was an unconstitutional taking of property, inasmuch as it denied to the owner a lawful use of the property.3

The prohibition of certain kinds of business in certain localities and in certain kinds of houses, will be justified, if it can be established to be a reasonable regulation for the preservation of the health of the inhabitants of the locality, or of the inmates of the house. But that fact must be judicially established; and the legislative determination, that the trade in question is injurious to health, if conducted in the prohibited localities or houses, is not conclusive. Thus a law has been declared to be unconstitutional, which prohibited the manufacture of cigars in tenement houses, because the New York Court of Appeals did not agree with the legislative determination, that the public health or comfort was endangered by the prosecution of the trade in such places.1

Not only has the legislature exercised the power of confining the prosecution of certain trades to certain localities, but it has very often, particularly in respect to the vending of fresh meat and vegetables, prohibited the plying of the trade in any other place than the market, which is established and regulated by the government. This regulation is very common in all parts of this country, and has frequently been the source of litigation; but it has generally been held to be reasonable.2 In the case of New Orleans *v.* Stafford,3 the Supreme Court of Louisiana presents forcibly the reasons which justify this police regulation:—

"Has the legislature the power to make the regulation which it made by this act of the twenty-sixth of February, 1874, declaring that private markets shall not be established, continued or kept open within twelve squares of a public market? This question, we think, must be answered in the affirmative. And the power arises from the nature of things, and what is termed a police power. It springs from the great principle, *salus populi suprema est lex.* There is in the defendant's case no room for any well grounded complaint of the violation of a vested private right, for the privilege, if he really possessed it, of keeping a private market, was acquired subordinately to the right existing in the sovereign to exercise the police power to regulate the peace and good order of the city, and to provide for and maintain its cleanliness and salubrity. By way of illustrating this necessarily existing power to regulate the number, location and management of markets, take the city of New Orleans, in a warm climate, located in a low district of country, surrounded by marshes and swamps, which in the hot season under favorable conditions envelops its large population in a malarious atmosphere. Under such circumstances the danger of epidemics becomes imminent. It behooves the city authorities at such periods to be on the alert to obviate local causes of disease within the limits of the city. Among such causes the decay of animal and vegetable matter is a prominent one. The markets therefore must on that account be strictly attended to and such measures adopted in regard to them as in the judgment of the proper authorities, the public health may require." * * * "We presume it will not be denied that under circumstances of peril and emergency the law-maker would have the right to abolish or suspend an occupation imperiling the public safety. This power is inherent in him. He may exercise it prospectively for prevention as well as *pro rata,* for immediate effect. It is

within his discretion when to exercise this power, and persons, under license to pursue such occupations as may in the public need and interest be affected by the exercise of the police power, embark in those occupations subject to the disadvantages which may result from a legal exercise of that power."1 On the same general principles, it has been held to be constitutional to prohibit the keeping of a private market within six squares of a public market.1

The same principles would govern in their application to cases of a similar character. It cannot be doubted, for example, that the State may directly, or through a municipal corporation, establish a public slaughter-house, where butchers must bring their cattle to be slaughtered, and prohibit the slaughtering of cattle elsewhere. Compelling persons to pursue such callings in public places, established and regulated by the State, is looked upon as reasonable. But when the State, instead of establishing a public market or slaughter-house, and placing it under the management and control of State officials, grants to a private individual or corporation the exclusive privilege of maintaining a public market or slaughter-house, serious objections are raised to the constitutionality of the legislative act; and the franchise is often claimed to be void because it creates a monopoly.

[Back to Table of Contents]

§ 127.

Monopolies—General Propositions.—

As a general proposition, it may be conceded that the creation of a monopoly out of an ordinary calling is unconstitutional. But it will not do to say that all monopolies are void. Every man has, under reasonable regulations, a right to pursue any one of the ordinary callings of life, as long as its pursuit does not involve evil or danger to society. And a law which granted to one man, or a few individuals, the exclusive privilege of prosecuting the trade, would be in violation of the constitutional rights of those who are prohibited from pursuing the same calling. This is clear. Mr. Justice Field of the Supreme Court of the United States has presented this proposition in very forceful language in the case of the Butchers' Union Co. *v.* Crescent City Co.[1] The late justice said:—

"As in our intercourse with our fellow-men, certain principles of morality are assumed to exist, without which society would be impossible, so certain inherent rights lie at the foundation of all action, and upon a recognition of them alone can free institutions be maintained. These inherent rights have never been more happily expressed than in the Declaration of Independence, that new evangel of liberty to the people: 'We hold these truths to be self-evident'—that is so plain that their truth is recognized upon their mere statement—'that all men are endowed'—not by edicts of emperors, or decrees of Parliament, or acts of Congress, but 'by their Creator, with certain inalienable rights'—that is, rights which cannot be bartered away, or given away, or taken away, except in punishment of crime—'and that among these are life, liberty and the pursuit of happiness, and to secure these'—not grant them, but secure them—'governments are instituted among men, deriving their just powers from the consent of the governed.' Among these inalienable rights, as proclaimed in that great document, is the right of men to pursue their happiness, by which is meant the right to pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of others, which may increase their prosperity or develop their faculties, so as to give to them their highest enjoyment. The common business and callings of life, the ordinary trades and pursuits, which are innocuous in themselves, and have been followed in all communities from time immemorial, must, therefore, be free in this country to all alike upon the same conditions. The right to pursue them without let or hindrance, except that which is applied to all persons of the same age, sex and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright. * * * In this country it has seldom been held, and never in so odious a form as is here claimed, that an entire trade and business could be taken from citizens and vested in a single corporation. Such legislation has been regarded everywhere else as inconsistent with civil liberty. That exists only where every individual has the power to pursue his own happiness according to his own views, unrestrained, except by equal, just and impartial laws."

This constitutional right of the citizen to pursue any occupation he may choose, which is not inherently and necessarily wrongful or injurious to society, subject only to reasonable police regulations for the protection of individuals and of society against incidental wrongs and injuries, has recently been confirmed by the New York Court of Appeals, in the Ticket Scalpers case,1 of which a full account is given in a preceding section,2 and to which the reader is referred for the details. Suffice it here to repeat, that one of the grounds, upon which the Court of Appeals pronounced the law unconstitutional, was that it denied to individuals the right to pursue a business, which was not inherently fraudulent or wrongful, and granted to certain persons, the agents of transportation companies, the exclusive privilege or monopoly of prosecuting the business of selling transportation tickets. The authorities, however, are not unvarying in their deductions from the application of these general principles, which are universally conceded to be sound, to the facts and law of a particular case, as will be more fully explained in subsequent sections.

When, on the other hand, the State bestows upon one or more the privileges of pursuing a calling, or trade, the prosecution of which is not a common natural right because it cannot be prosecuted without the aid of a legal privilege, a lawful monopoly is created, but no right of the individual is violated; for, with the abolition of the monopoly thus created, would disappear all right to carry on the trade. The trade never existed before as a lawful calling. Such monopolies are valid, and free from all constitutional objections.1 The grant of exclusive franchises is a matter of relatively common occurrence, and is rarely questioned.

[Back to Table of Contents]

§ 128.

Monopolies And Exclusive Franchises In The Cases Of Railroads, Bridges, Ferries, Street Railways, Gas, Water, Lighting, Telephone And Telegraph Companies.—

In order that a railroad, or bridge, may be constructed, or a gas or water plant be established, the government must grant to the parties who contemplate such construction, a franchise or privilege, which is not enjoyed by individuals in general, and which is not procurable in any other way except by express legislative grant. In the case of the railroad or bridge, the privilege or franchise is the right of eminent domain, whereby the railroad or bridge company may appropriate to its own use, upon payment of compensation, the lands of private owners, which are needed in the construction of the projected railroad or bridge. It is barely possible that the necessary land for the construction of a bridge or ferry may be procurable by a voluntary contract of sale and purchase; but this is not true of a railroad. And, in the case of the bridge or ferry, over a navigable stream, the government's consent to this extraordinary use of the stream must still be obtained. Therefore, as long as the question is confined to the case of such exceptional franchises, as railroads, bridges, ferries, and the like, it seems as if the constitutional right of the government has never been seriously questioned, since it was settled by the early adjudications that the legislature could grant to persons or to private corporations the privilege of exercising the right of eminent domain, in the pursuit of some public good.1 The natural rights of no private individual to carry on a lawful business have been thereby violated. It is, therefore, clearly within the power of the legislature to determine how many shall receive this unusual privilege or franchise, and on what terms and under what conditions they shall be permitted to exercise it. Nor has the power of the legislature, to grant to one individual or corporation an exclusive privilege or franchise of this kind, been seriously questioned, except in recent years. In every case, however, but one, which has come to my notice, the power of the legislature to create an exclusive monopoly of that kind has been confirmed. It has thus been held to be lawful to grant exclusive ferry privileges.2

It has also been held to be a lawful monopoly, which was granted to a bridge company by a city, by a contract, wherein the city permits the erection of one end of the bridge in a street of the city, and agrees to suspend the use of its ferry franchise for twenty-five years.1 It was also held to be lawful, and not in contravention of the Fourteenth Amendment of the United States Constitution, for a State legislature to grant to a private corporation an exclusive franchise over a stream, which is wholly within the State, and the right to exact toll of every one for the use of the stream, in consideration of the undertaking of the corporation to improve the navigableness of the stream.2 So, likewise, has it been held to be within the power of the legislature, without the consent of the city, and without the payment of any compensation to the city, to grant to a railroad company, for its own use, that part of the bank or shore of a

river, which is known as the "Public Levee," and which is located within the city.3 In Minnesota, the grant to any person, having boats upon the river, of the exclusive use of so much of a public levee as was necessary for its business, was sustained; provided the exercise of this exclusive privilege to a part or parts of the levee did not unreasonably interfere with the use of the levee by the public in general.4

In New Jersey, an act of the legislature provided that any citizen of the State, occupying since January 1, 1880, for planting and cultivating oysters, any lands under the tide waters of the State, which are not natural clam or oyster beds, shall thereafter have an exclusive title to such lands for such purposes, and to the oysters planted and grown thereon. This act was held to be unconstitutional, because it was a grant of an exclusive privilege by a special or local law, in violation of the constitution of the State.1

It has, of course, been the settled law, since the decision of the Supreme Court of the United States in the case of the Charles River Bridge *v.* Warren River Bridge,2 that no grant of a franchise is exclusive, unless it is made so by an express declaration of the legislature.3

The power of the legislature to grant an exclusive monopoly in the case of railroads, bridges, ferries, and the like, seems still to be well-settled. But when the same principle is applied to the more common and numerous franchises, as, for example, a more or less extraordinary use of the streets of a city, the cases do not always support the distinctions that have been made. Thus it has been held to be reasonable to grant to one or more the exclusive right to remove the carcasses of animals and other offal and garbage of a city.4 But the Supreme Court of Kansas opposes this conclusion, and holds that a board of health or city government, in granting to one or more persons the exclusive privilege of removing the garbage of a city from private premises, as well as from public places, created an illegal monopoly.1 Certainly the removal of the garbage, offal and other refuse of a city, is not a business which can be safely left to unrestricted private enterprise. The public health and comfort imperatively demand that it should be done with care, and by persons who would come under the rigid control of the health officers. This case from Kansas can be justified only on the ground, that the business should be done by the city government itself, instead of being farmed out to private corporations or individuals.

It has been held in some States, although a different conclusion is reached in other States, that the exclusive grant to a company of the right to furnish the city with gas, was unlawful and void, as being a monopoly: "As, then, no consideration whatever, either of a public or private character, was reserved for the grant; and as the business of manufacturing and selling gas is an ordinary business, like the manufacturing of leather, or any other article of trade in respect to which the government has no exclusive prerogative, we think that so far as the restriction of other persons than the plaintiffs from using the streets for the purpose of distributing gas by means of pipes, can fairly be viewed as intended to operate as a restriction upon its free manufacture and sale, it comes directly within the definition and description of a monopoly; and although we have no direct constitutional provision against a monopoly, yet the whole theory of a free government is opposed to such grants, and it does not require even the

aid which may be derived from the Bill of Rights, the first section of which declares 'that no man or set of men are entitled to exclusive public emoluments' to render them void."2 Certainly it is a franchise to make excavations for the laying of pipes for the distribution of the gas, very different from "the manufacture of leather;" and being a franchise, the enjoyment of it may be made an exclusive privilege. The public interests may also be protected against the indiscriminate allowance of excavations of the streets for the purpose of laying down the conducting pipes; and so it has been held by the majority of the modern cases, that an exclusive franchise to supply illuminating gas to a city may be lawfully granted to one corporation.1 The same conclusion has been reached as to the power of the government to grant an exclusive franchise for the supply of a city with electric light,2 and for the construction and maintenance of street railways along certain streets, and within certain areas.3

It has also been held that, even if monopolies in general are prohibited, it is nevertheless competent to grant the exclusive right to a company to supply a city with water for a term of years.4 In Iowa, in a case involving much doubt, it was declared to be unreasonable to grant to one person the exclusive right to run omnibuses in the city.1

In most of the cases, in which an extraordinary use of the streets and highways is granted as a privilege or franchise, to the gas, water, electric, telegraph, telephone and street railway companies, the grant is not of an exclusive franchise (it is more common in the case of street railways); and the power of the legislature to grant a parallel franchise of the same kind to a competitor, has not been taken away by the prior grant of the privilege, as long as the privilege was not by express terms made an exclusive one. Thus a legislative grant in general terms to supply water to a city, does not give an exclusive franchise.2 Nor is an exclusive franchise to be inferred from an agreement of the city to do nothing to interfere with the exclusive character of the franchise of a gas company, where the power to make it exclusive is lodged in the legislature of the State, and not in the city government.3 In such cases, there is no violation of any franchise right, if a competing franchise is granted to another company. But where an exclusive franchise is granted to a corporation—to supply a city with water, to furnish gas or electric light, or to construct a street railway along a certain route,—only by the exercise of the power of eminent domain, and upon the payment of proper compensation, may that exclusive franchise be taken away by the grant to another corporation of a competing franchise.1

But where a private corporation has acquired by legislative grant an exclusive franchise to supply a city with light, water, transportation facilities, and the like; the duty of the corporation, towards the public, to satisfy the public needs, is much stronger than it is where the franchise is not exclusive. Not only is the exclusive franchise liable to forfeiture for failure of the company to reasonably perform its duty to the public; but where the public health is endangered, as in the case of the supply of impure water, the exclusive character of the franchise may be ignored, and a franchise be granted to a rival company. This is held to be only a reasonable exercise of the police power in the preservation of the public health. It would be a monstrous doctrine that, because an exclusive franchise has been granted to a water company, the government would be powerless to protect a city from the diseases which impure

water engenders.2 Still the exclusive character of the franchise will be protected from infringement, even when a rival company proposes to furnish better and purer water, as long as the legislature or city government does not exercise the police power to condemn the existing water supply. Thus the constitution of Louisiana of 1879, abrogated the monopolistic features of all existing corporations. This constitutional action was clearly in violation of the United States constitution, which prohibits States from passing any law impairing the obligation of a contract. And the Supreme Court of the United States held that this clause of the Louisiana constitution did not authorize a rival water company to furnish water to the people of New Orleans, merely on the ground that they could furnish a better and a purer water, as long as the legislature or the city government had not, in the exercise of the police power, condemned the water which was supplied by the company which had procured an exclusive franchise from the State legislature.1

The grant to a private corporation of a franchise, to supply water or light to a city, does not always operate as an exclusive franchise, so as to preclude the exercise by the city of its authority to establish its own plant in opposition to the private company. Thus, in Minnesota, a private water company was given the right to supply the city of Duluth with water; and in the grant of the franchise it was stipulated that the city shall have the right to purchase the water plant. The city, however, chose to establish its own water plant, instead of buying out the water company. It was held that the water company had not such an exclusive franchise as would force the city to purchase the company's plant, or forego municipal ownership of its water supply.2 And in West Virginia it was held that an exclusive franchise to light the city streets with gas, did not preclude the abandonment of gas light and the adoption of electric light in its stead; and that such municipal action was not a violation of any franchise rights of the gas company.1 And so, likewise, in Indiana, it has been held that no monopoly of supplying the city with gas on its streets was created, by a stipulation in the charter of the gas company, that it shall erect and maintain a certain number of lamps on certain streets, and increase them when the city government directs it, and that the city shall pay for sufficient gas to keep the lamps lighted. Notwithstanding this contract, it was held that the city could patronize other gas companies, and was not obliged to procure all the gas it needed from the one company, with whom this contract was made.2

In a recent case, the Federal Circuit Court held that an exclusive franchise may be granted by implication, and was granted upon these facts. A State statute granted a city power to construct its own waterworks or to contract with private parties for supplying the city with water. The city government chose the latter plan, and granted a water franchise to a private corporation. When the water plant of the company was completed and the company was about to supply the city with water, an ordinance was passed by the city council, ratified by a vote of the people, which provided for the construction of waterworks by the city government. The court held this subsequent action of the city to be in impairment of the previous contract with the private company, in violation of the constitution of the United States.3 It does not seem possible to reconcile this case with the current of authority, both State and Federal, except so far as it holds the city liable on any contract which it had made to take water from the private company during the stated period. For the uniform ruling of the

courts has been that a franchise is never exclusive, except so far as it has been expressly declared to be so.

But, apart from this question of construction, whether a particular franchise is exclusive, the equally important but more fundamental question has been raised by some recent decisions, whether an exclusive franchise can be granted without exceeding the power of the legislature. Until recently, the right of the government to grant an exclusive public franchise for water, light, or railway, has been fully conceded, as a logical deduction from the power to grant to a few persons in the promotion of the public welfare any privilege or franchise which cannot be left open to general competition. But in several of the State constitutions, there is an express prohibition of the grant of exclusive or monopolistic franchises. The clause in the North Carolina constitution is as follows: "Perpetuities and monopolies are contrary to the genius of a free State, and ought not to be allowed." A similar, if not identical, clause is to be found in the constitutions of Alabama and Texas. The Alabama and North Carolina courts have declared that this clause of the State constitutions prohibits the legislatures from granting any exclusive franchise whatever.1 And the United States Circuit avoids the settlement of the direct question, whether a similar clause in the Texas constitution prohibits the grant of an exclusive franchise to a water company, by holding, and justly, too, that the statute in question did not grant an exclusive franchise. But the court took occasion to add, by way of *obiter dictum,* that in its opinion, the constitutional clause in question did not inhibit an express grant by the legislature of an exclusive franchise, where the public interests are promoted by giving to the grant of a franchise the character of exclusiveness.2

[Back to Table of Contents]

§ 129.

Patents And Copyrights, How Far Monopolies.—

It is often stated, that the copyright and the patent of an invention are monopolies, which are permissible by law. But it seems to me that they are monopolies only so far as they make the right of manufacture exclusive. If the common-law theory in respect to these subjects be correct, that there is no natural right to the exclusive manufacture of one's own inventions and intellectual productions, then the grant of the exclusive right to manufacture is a monopoly, and cannot be better sustained than a monopoly of the manufacture of sugar or any other product. But the prodducts of mental labor, when they take the shape of a book or an invented machine, ought to be as secure to the producer, as the products of manual labor, and it is the possibly unconscious recognition of the justice of these claims, which brings about popular justification of these so-called monopolies.

[Back to Table of Contents]

§ 130.

When Ordinary Occupations May Be Made Exclusive Monopolies—Saloons—Banking—Insurance—Peddling—Building And Loan Associations—Restriction Of Certain Trades To Certain Localities—Slaughterhouses—Markets.—

Notwithstanding the contradictions of the authorities, it is not difficult to determine on principle, as enunciated above, that the grant of privileges not otherwise acquirable may be made a monopoly, but that a monopoly cannot be made of the ordinary lawful occupations. The difficulty becomes almost inexplicable, when the exclusive privilege is granted of carrying on a business, which is prohibited to others, because the unlimited pursuit of it works an injury to society. There is no doubt that a trade or occupation, which is inherently and necessarily injurious to society, when it is unrestricted and left open to private enterprise, may be prohibited altogether. If it is lawful for the State to prohibit a particular business altogether, the pursuit of such a business would, if permitted to anyone, be a privilege or franchise, and like any other franchise may be made exclusive. This is but a logical consequence of the admission, that the State has the power to prohibit the trade altogether. Such an admission is fatal to a resistance of the power to make it a monopoly. It has thus been held to be constitutional to limit the number of saloons or bar-rooms for which licenses will be issued. A Massachusetts statute provided that the number shall not exceed one for each one thousand of the population of a city or town, and it was held not to violate the constitutional prohibition of unequal privileges; the court resting its judgment on the proposition that the liquor business may be prohibited altogether; and hence the limitation of the number of saloons was only a reasonable police regulation, which the legislature could lawfully adopt in the place of total prohibition, in the exercise of its wise discretion.[1]

Banking and insurance are in one sense of the word ordinary callings, which the man of sufficient capital could successfully pursue; and, in the case of banking, he could without doubt safeguard the interests of depositors within the utmost reason. It is probably true that this could be effected in the case of all kinds of insurance other than life; inasmuch as marine, fire, storm, and other like kinds of insurance are taken out usually to cover only one, three and five years. But in a policy of life insurance, interests are created and acquired, which it might require many years to realize. To permit private individuals, no matter how wealthy they are, to engage in the business of life insurance, would be a gross wrong to policy holders, because by no measures could their interests be properly safe-guarded against the likely accident of the death of the insurer. A statute, which would prohibit any person or corporation from issuing a policy of life insurance, unless expressly authorized by the laws of the State,[1] would be clearly constitutional. And it would not be unconstitutional to prohibit absolutely a natural person from issuing a policy of life insurance under any circumstances. But it would be more open to question, how far the business of marine, fire and other like

insurance could by statute be converted into a monopoly or exclusive franchise, and be denied altogether to natural persons. That the business may be subject to regulations, which are needed to assure the policy holder of the possession by the insurer of ample funds to pay the losses under the policies when they occur, is unquestioned. But this can be readily accomplished in all other kinds of insurance, other than life, without denying to the natural person absolutely the right to issue a policy of insurance. The limited duration of policies of insurance, other than life, makes the accident of death of the insurer a matter of little moment.

The same principles apply to the business of banking. There is no reason why a successful police regulation of the business of banking, in the interests of depositors and other creditors, is not consistent with the recognition and permission of the existence of private banks and banking houses; at least so far as the necessary, and what might be called the legitimate and invariable, business of banking is concerned; viz., the receipt of deposits and the lending of money to borrowers. It is plain that the government could not allow private bankers to issue bank notes, which shall pass current, as a substitute for legal tender. But that is an extraordinary function of banks, which is easily separable from the common and ordinary banking business, and which in this country is now practically prohibited to all banks and bankers, other than the national banks, i. e., banks which have been incorporated under the National Banking Act. I believe, therefore, the Supreme Court of South Dakota was right, when it declared that the State banking law was unconstitutional, so far as it prohibited any person or firm from carrying on the business of banking, by receiving deposits, by discounting and negotiating notes, buying and selling exchange, coin and bullion, etc., without first becoming an incorporated association under the act.[1] The right of doing a banking business of the kind described was properly characterized by the court as a right of the citizen, which could not be taken away from him, without violating his constitutional liberty. He may be rightfully subjected to all kinds of reasonable police regulations, which are designed to protect depositors against the fraud and insolvency of the banker; but the absolute prohibition of the business, to any but incorporated companies, is not sanctioned by any threatened danger or injury to the public. However, the Supreme Court of North Dakota reached a different conclusion, holding that a similar law was constitutional.[2]

It has been held in Oklahoma to be an unconstitutional grant of a special privilege to provide by law that all the territorial printing shall be done by a particular named company, in violation of the act of Congress, July 30, 1886, which prohibits the territorial legislature from passing any special law, granting any exclusive privilege, immunity or franchise.[3]

The most remarkable case, involving the creation of an exclusive privilege of the pursuit of an ordinary calling or business, is that of an act of the legislature of Pennsylvania which requires all peddlers to take out licenses, before they can lawfully ply their business; and restricts the issue of such licenses to physically disabled persons. And the denial of the right to peddle to able-bodied persons is declared by the Supreme Court of Pennsylvania to be a constitutional exercise of the police power to protect society against lawless able-bodied vagrants. It was held, for that reason, that the statute did not violate any inherent and indefeasible right of “acquiring,

possessing and protecting property."[1] Surely it is a gross misstatement of fact that able-bodied peddlers are necessarily vagrants and lawless persons. Doubtless, the peddlers commit many frauds upon the credulous and ignorant. But they are not all dishonest; and the business of peddling is not necessarily dishonest, any more than is the business of any other small tradesman, who deals in lawful articles of trade, and who has his established place of business. The only necessary distinction between a peddler and the ordinary small tradesman, lies in the fact that the former has no permanent place of business, but carries his stock of goods, on his back or in a wagon, from place to place, and from house to house. The peddlers may be lawfully required to submit themselves to police regulations, for the prevention of the practice of frauds; and they may be lawfully required to take out a license, and to pay a reasonable fee therefor; but the business of peddling cannot be lawfully converted by statute into an exclusive privilege of the halt and the blind, without violating the natural right of the able-bodied person to pursue the calling. The business is not inherently and necessarily harmful to society. It cannot, therefore, according to the prevalent principles of constitutional limitations, be made the exclusive privilege or monopoly of certain classes of the population.

Another peculiar immunity or privilege is the exemption by statute of building and loan associations from the prohibitions of the laws against usury. Such exemptions have been declared to be constitutional.[1] In a previous section,[2] I have explained my reasons for declaring all laws against usury, which are nothing more than regulations of the borrowing price of money, to be an unconstitutional interference with the liberty of contract. But if it is constitutional to prohibit one man from charging more than a stated rate of interest for the loan of money, it certainly cannot be constitutional to permit another or a particular class of corporations, to charge a higher rate. The constitutional guaranty, both State and Federal, of the equal protection of the laws, is most clearly violated by any such discrimination. I am not unaware of the argument that the contractual relations of a building and loan association and a borrowing member of such an association are peculiar, and contain features which are absent from the ordinary relation of debtor and creditor. But if it is allowable for the government to prohibit in any case the stipulation for more than the stated maximum rate of interest, in any instrument of indebtedness, the prohibition should be uniform and applicable alike to all debtors and creditors, including building and loan associations.[3]

Not only is it true that, where the public interests require it, ordinary callings and businesses may be converted by statute into more or less exclusive monopolies, but the same principle applies to those cases, where the law provides that a particular trade shall be conducted in certain buildings or localities. We have seen that it is reasonable to prohibit the prosecution of certain trades except within a certain area, or in certain public buildings, owned and managed by the State or town. But the same objection is raised, if the State or town, instead of constructing and maintaining these public buildings, authorizes a private individual or corporation to erect and conduct them under police regulations. The monopoly, thus created, is not any more objectionable on principle, because it does not interfere to any greater degree, or in any different way, with the liberties of others who are prohibited, than the erection and maintenance of such buildings by the government. If the State has the

constitutional power to prohibit the prosecution of such a trade in all other buildings, the prohibition is equally irksome, whether the buildings are owned by the public or by private individuals; and the grant of the right to prosecute an otherwise prohibited trade in the buildings of a private individual or corporation would create a privilege, and may therefore be made a monopoly. If there is any valid objection to this regulation, it will be found to apply equally to all like cases, whether the buildings in which the trade is required to be conducted belong to the State or private persons; and the regulation is unconstitutional, because the prosecution of the business anywhere will not produce any injury to the public.

This doctrine has been established and applied to the case of slaughter-houses. The legislature of Louisiana provided for the erection by a certain private corporation of slaughter-houses on the Mississippi, near New Orleans, to which all butchers within a certain area were required to bring their cattle for slaughtering. The law compelled the corporation to provide convenient accommodation for all butchers, who applied, upon the payment of a reasonable compensation, and the slaughtering of animals elsewhere was absolutely interdicted. Suits were brought to resist the enforcement of the law, on the ground that it interfered with the constitutional rights of those interdicted and created a monopoly, not allowed by the constitution. The cases finally reached the Supreme Court of the United States, and the law was declared, by a divided court, to be constitutional. In delivering the opinion of the court Justice Miller said:—

"It cannot be denied that the statute under consideration is aptly framed to remove from the more densely populated part of the city the noxious slaughter-houses, and large and offensive collections of animals necessarily incident to the slaughtering business of a large city, and to locate them where the convenience, health and comfort of the people require they shall be located. And it must be conceded that the means adopted by the act for this purpose are appropriate, are stringent, and effectual. But it is said that, in creating a corporation for this purpose and conferring upon it exclusive privileges—which it is said constitute a monopoly—the legislature has exceeded its power. If this statute had imposed on the city of New Orleans precisely the same duties, accompanied by the same privileges, which it has on the corporation which it created, it is believed that no question would have been raised as to its constitutionality. In that case the effect on the butchers' pursuit of their occupation and on the public would have been the same as it is now. Why cannot the legislature confer the same powers on another corporation, created for a lawful and useful public object, that it can on the municipal corporation already existing? That wherever a legislature has the right to accomplish a certain result, and that result is best attained by means of a corporation, it has the right to create such a corporation, and to endow it with the power necessary to effect the desired and lawful purpose, seems hardly to admit of debate. The proposition is ably discussed and affirmed in the case of McCulloch *v.* State of Maryland, in relation to the power of Congress to organize the Bank of the United States to aid in the fiscal operations of the government. * * *

"Unless, therefore, it can be maintained that the exclusive privileges granted by this charter for the corporation, is beyond the power of the legislature of Louisiana, there can be no just exception to the validity of the statute. And in this respect we are not able to see that these privileges are especially odious or objectionable. The duty

imposed as a consideration for the privilege is well defined, and its enforcement well guarded. The prices or charges to be made by the company are limited by the statute, and we are not advised that they are on the whole exorbitant or unjust."

"The proposition is, therefore, reduced to these terms: Can any exclusive privilege be granted to any of its citizens, or to a corporation, by the legislature of the State? * * *

"But it is to be observed, that all such references are to monopolies established by the monarch in derogation of the rights of the subjects, or arise out of transactions in which the people were unrepresented and their interests uncared for. The great *Case of Monopolies,* reported by Coke, and so fully stated in the brief, was undoubtedly a contest of the Commons against the monarch. The decision is based upon the ground that it was against common law and the argument was aimed at the unlawful assumption of power by the crown; for whoever doubted the authority of Parliament to change or modify the common law? The discussion in the House of Commons cited from Macaulay clearly establishes that the contest was between the crown and the people represented in Parliament.

"But we think it may be safely affirmed that the Parliament of Great Britain, representing the people in their legislative functions, and the legislative bodies of this country, have from time immemorial to the present day, continued to grant persons and corporations privileges—privileges denied to other citizens—privileges which come within any just definition of the word monopoly, as much as those now under consideration, and that the power to do this has never been questioned or denied. Nor can it be truthfully denied that some of the most useful and beneficial enterprises set on foot for the general good, have been made successful by means of these exclusive rights, and could only have been conducted to success in that way.

"It may, therefore, be considered as established, that the authority of the legislature of Louisiana to pass the present statute is ample, unless some restraint in the exercise of that power be found in the constitution of that State, or in the amendments to the constitution of the United States."

"The statute under consideration defines these localities, and forbids slaughtering in any other. It does not, as has been asserted, prevent the butcher from doing his own slaughtering. On the contrary, the Slaughter-House Company is required, under a heavy penalty, to permit any person who wishes to do so, to slaughter in their houses; and they are bound to make ample provision for the convenience of all the slaughtering for the entire city. The butcher then is still permitted to slaughter, to prepare and to sell his own meats; but he is required to slaughter at a specified place and to pay a reasonable compensation for the use of the accommodations furnished him at that place. The wisdom of the monopoly granted by the legislature may be open to question, but it is difficult to see a justification for the assertion that the butchers are deprived of the right to labor in their occupation, or the people of their daily service in preparing food, or how this statute, with the duties and guards imposed upon the company, can be said to destroy the business of the butcher, or seriously interfere with its pursuit."[1]

This is not the only case in which the right of the government to create such a monopoly has been sustained. In Iowa, a law was sustained, which granted to private individuals the exclusive right to erect and maintain a public market in which all vendors of fresh meat and vegetables were required to ply their trade.1 And in Louisiana it was held that, not only may the municipality of New Orleans grant to private persons the exclusive privilege of erecting and maintaining a public market, in partnership with the city, but that the city council cannot legislate in respect to the regulation of the markets, without consulting the partners, where the regulation is likely to affect the financial interest of the partnership.2 So, also, it has been held in Kansas, that a law is not unconstitutional which restricts the sale of liquors to druggists and for special purposes.3 On the other hand, in an early case in New York, it was declared to be unconstitutional to prohibit to persons in general the manufacture of pressed hay in the thickly settled parts of a city, on account of the danger of fire, and grant to one or more the exclusive privilege of engaging in that business within the prohibited district. The court says:—

"If the manufacture of pressed hay within the compact parts of the city is dangerous in causing or promoting fires, the common council have the power expressly given by their charter to prevent the carrying on of such manufacture; but as all by-laws must be reasonable, the common council can not make a by-law which shall permit one person to carry on the dangerous business, and prohibit another who has an equal right from pursuing the same business."1

In a case, parallel with the slaughter-house cases of Louisiana, the city of Chicago passed an ordinance designating certain buildings for slaughtering all animals intended for sale or comsumption in the city, the owners of the buildings being granted for a specified period the exclusive privilege of having all such animals slaughtered in their establishment, and exacting a certain fee from the owners of animals so slaughtered. In passing upon the constitutionality of this law, the Supreme Court of Illinois pronounced the following opinion: "The charter authorizes the city authorities to license or regulate such establishments. When that body has made the necessary regulations, required for the health or comfort of the inhabitants, all persons inclined to pursue such an occupation should have an opportunity of conforming to such regulations; otherwise the ordinance would be unreasonable and tend to oppression. Or if they should regard it for the interest of the city that such establishments should be licensed, the ordinance should be so framed that all persons desiring it might obtain licenses by conforming to the prescribed terms and regulations for the government of such business. We regard it neither as a regulation nor a license of a business, to confine it to one building or to give it to one individual. Such an action is oppressive, and creates a monopoly that never could have been contemplated by the general assembly. It impairs the rights of all other persons, and cuts them off from a share in not only a legal, but a necessary business. Whether we consider this as an ordinance or a contract, it is equally unauthorized, as being opposed to the rules governing the adoption of municipal by-laws. The principle of the equality of rights is violated by this contract. If the common council may require all of the animals for the consumption of the city to be slaughtered in a single building, or on a particular lot, and the owner be paid a specific sum for the privilege, what would prevent the making a similar contract with some other person that all of

the vegetables or fruits, the flour, the groceries, the dry goods, or other commodities should be sold on his lot and he receive a compensation for the privilege? We can see no difference in principle."[1]

This presentation of the subject readily indicates an almost hopeless contradiction of authorities; but it seems to be without doubt, that the doctrine laid down by the Supreme Court of the United States in the Slaughter-house Cases will ultimately come to be recognized as the correct one.

[Back to Table of Contents]

§ 131.

National, State And Municipal Monopolies.—

In preceding pages of this discussion of the right to create monopolies, the constitutionality of the creation of exclusive franchises and monopolies has been chiefly considered from the standpoint of the individuals who have been prohibited by law from the prosecution of a lawful and natural calling or business, because it has been converted by statute into a more or less exclusive privilege and granted as such to a few persons or corporations. In the case of monopolistic franchises, which necessarily involve the grant by the government of a peculiar or extraordinary privilege or power, before the business can be successfully established or conducted, and without which no individual could undertake it, however resourceful he may be; there can be very little doubt that no one's personal liberty has been particularly restrained by the grant of such a franchise as a special privilege to a few persons or corporations; or even when it is granted as an exclusive monopoly to one person or corporation. No one's constitutional right to pursue any lawful calling has been infringed by the grant of an exclusive right to build and maintain a railway between two termini, or a street railway along a certain street or avenue of a city. Nor, as it has also been argued, has any man's constitutional right to pursue any lawful calling been violated by the grant to a few persons or corporations, or even to one, the exclusive right to carry on a business, however natural and ordinary it may be, which,—because it is inherently and necessarily injurious to the welfare of society, or dangerous to individuals, when left open to the unrestricted competition of individuals,—may be prohibited altogether. If total prohibition of a trade or business is constitutionally justifiable, certainly the constitutional rights of the individuals who are denied the privilege of carrying on such a business, are not more seriously interfered with, if, instead of prohibiting the trade altogether, the legislature were to grant the more or less exclusive privilege of carrying on the prohibitable business to a few persons or corporations, under more or less strict police supervision.

But, conceding the soundness of these propositions of constitutional law, the question still remains to be asked and answered: Does not the grant of exclusive or monopolistic privileges to a few persons or private corporations, even in the apparently necessary and justifiable cases, which I have just described, conflict with our constitutional declarations of equality of all men before the law, and with our guaranty to all of equal privileges and immunities? Is it a sufficient answer to such a question to say, that public interests forbid that any and every man, who wants to and has the necessary capital, should be permitted to construct a railroad, a street railway, a gas, electric light, water, telegraph or telephone plant; that, on the other hand, these conveniences are public necessities, and that there is no alternative but to make more or less exclusive monopolies of them? Granted that individuals cannot be allowed indiscriminately, and without restraint, to exercise the right of eminent domain and to tear up the streets of a city in order to lay down conduit pipes and tracks; it does not necessarily follow that the right to do these things should be granted as a private

monopoly to a few persons or corporations. If there was no other alternative to the creation of such private monopolies but the denial of these conveniences and necessities to the people, it might be excusable to ignore the patent and unmistakable repugnance to our constitutional principle of the grant of such exclusive privileges. But there is another alternative. That is, that whatever business or calling cannot be opened to the free choice of all persons without favor or discrimination,—subject only to reasonable regulations for the protection of the public and of individuals against fraud and other wrongs and dangers—should and can be made a government monopoly, instead of being granted to private individuals and corporations.

Whatever arguments may be advanced in opposition, there can be no doubt of the existence of a most marked tendency all over this country to convert into government monopolies every public franchise, which serves to satisfy some public want. The cities have almost universally constructed their own water works; and many own and conduct the gas works and electric light plants, for the supply of these necessities to private consumers, as well as for public use. The city of New York owns and manages a large number of the docks, has for years run the cable cars on the Brooklyn Bridge; and has just concluded (February, 1900) a contract for the construction of a railroad tunnel in Manhattan and Bronx Boroughs, to furnish rapid transit to the people of the city. And while the city does not now contemplate the conduct of this tunnel road by city officials, no question has ever been raised as to its power to do so, of that policy were deemed to be the wisest.

I believe the decisions, to which I will now refer, will afford a very clear delimitation of those businesses which can be, and of those which cannot be, converted into government monopolies. I will first refer to the cases in which the power of a municipality to engage in these enterprises is explained and set forth; because of the adoption at an early day of what must now in the light of recent decisions be classed among the fictions of the law, of the proposition that the municipal corporation has both a public and a quasi-private character, and that it may in the latter character lawfully, when empowered by its charter, engage in the so-called private business of vending to private consumers water and light, and of furnishing the private services of transportation and communication by telegraph and telephone. Elsewhere[1] I state this fiction of the law as follows:—

But in determining the constitutionality of government monopolies, a very important distinction must be made between the monopolies, which may be established and operated by the State government, and those which may, under legislative authority, be erected by a municipal corporation. The distinction rests upon the generally accepted doctrine, that a municipal corporation has a *quasi*-private character, as well as a strictly public character. The grant by the State to a municipal corporation of the power to establish and operate gas, electric light or water works, is a grant to the corporation in its semi-private character as the corporate representative of the local community, and not to it as the public representative of the State government.[1]

Fifty years or more ago the principles of individualism exerted over the political thought of this country a far more powerful and universal influence than they do now. And if it had been proposed in those days that a city government should assume the

monopoly of supplying its inhabitants with gas or water, the judicial veto would have been both decisive and general, that the government of the municipal corporation was only a local branch of the State government; and that it was not one of the functions of the government, either State, county or municipal, to engage in the private business of vending water or light to private consumers. And only recently has the Supreme Court of South Carolina held it to be an irrepealable limitation of the functions of municipal government.2 But the popular demand for the embarkation of municipal corporations in these enterprises of general utility gradually became stronger and stronger, until it became irresistible. Then the courts conceived of this fictional distinction between municipal and State governments, as a means of avoiding the shock to public opinion, which would be occasioned by the thought that the municipalization of such enterprises would inevitably lead to State socialism. Under the influence of this fiction, and of the argument that the supply of these general necessities, such as light and water, is the performance of a public act, and not an engagement of the municipal corporation in a private business, the courts have, in all of the cases, with the exception of the South Carolina case just cited,3 declared it to be within the constitutional power of the legislature to authorize cities and towns to erect and maintain plants for supplying private consumers with water and light.1 In the case of Smith *v.* City of Nashville,2 the court said: "Nothing should be of greater concern to a municipal corporation than the preservation of the good health of the inhabitants. Nothing can be more conducive to that end than a regular and sufficient supply of wholesome water, which common observation teaches all can be furnished in populous cities only through the instrumentality of well-equipped water works. Hence, for a city to meet such a demand is to *perform a public act and confer a public blessing.* * * * It cannot be held that the city in doing so is engaging in a private enterprise, *or performing a municipal function for a private end.*" And in reference to the establishment and operation by cities of gas and electric light works, the Supreme Court of Massachusetts3 said in part:—

"We have no doubt, that if the furnishing of gas and electricity for illuminating purposes is a public service, the performance of this service can be delegated by the legislature to cities and towns for the benefit of themselves and their inhabitants and that such cities and towns can be authorized to impose taxes for this purpose upon their inhabitants and to establish reasonable rates which the inhabitants who use the gas or electricity can be compelled to pay. The fundamental question is, whether the manufacture and distribution of gas or electricity to be used by cities and towns for illuminating purposes is a public service." * * * "Artificial light is not, perhaps, so absolutely necessary as water, but it is necessary for the comfortable living of every person. Although artificial light can be supplied in other ways than by the use of gas or electricity, yet the use of one or both for lighting cities and thickly settled towns is common, and has been found to be of great convenience, and it is practically impossible for every individual to manufacture gas or electricity for himself. If gas or electricity is to be generally used in a city or town, it must be furnished by private companies or by the municipality, and it cannot be distributed without the use of the public streets or the exercise of the right of eminent domain."

The court reserved the question whether the legislature could authorize cities and towns to furnish gas and electricity for heat and power, evidently ignoring the real

reason for the public supply of these things, viz.: that all of these wants can only be supplied by the grant, by the legislature, to the municipal or private corporation, as the case may be, of the monopolistic privilege of eminent domain, or of the extraordinary use of the streets and highways for the laying of conduit pipes and wires. All of these public and general utilities contain that same feature. And I do not hesitate to assert that whenever the special grant of a franchise or privilege is necessary to the prosecution of a business, such business can and should be made a State or municipal monopoly as the case may be, instead of a private monopoly in the hands of a private individual or corporation.

But, whenever the legislature authorizes a city to engage in a business, the prosecution of which does not require the ownership of any such peculiar and restricted privilege or franchise, and does not involve any danger to the public, the liberty of the individual, to pursue a lawful calling, is thereby infringed, if the business is made a municipal monopoly; and in any case, the city is assuming a private function, which the legislature cannot constitutionally confer. Thus, in a recent case,[1] it was held by a majority of the Supreme Court of Massachusetts that the legislature has not the power, under the constitution, to authorize the cities and towns within the commonwealth to buy coal and wood for the purpose of sale to their inhabitants for fuel, or to engage in any trade merely that it may be better carried on. But Mr. Justice Holmes in a dissenting opinion says: "I am of the opinion that when money is taken to enable a public body to offer to the public without discrimination an article of general necessity, the purpose is no less public when that article is wood or coal, than when it is water or gas or electricity, or education, to say nothing of cases like the support of paupers or the taking of land for railroads or public markets. I see no ground for denying the power of the legislature to enact the laws mentioned in the questions proposed." Mr. Justice Barker occupies a middle ground in this case between the opinion of the majority of the court and that of Justice Holmes, and holds that the test in all of these cases is whether the necessities of society, as now organized, can only be met by the engagement of the city government in the particular business. The objection to Justice Barker's statement of the limitation in this regard of the power of the legislature is that it is too vague to furnish a reasonable and satisfactory restraint upon the growing demands of the day for the embarkation of government in businesses, which have heretofore been left to private initiative and enterprise.

On the other hand, it has been held that, in the regulation of the trade in intoxicating liquors, a law providing for the exclusive sale of such liquors by agents of the town was constitutional.[1] If the courts did not unanimously reject the contention, which is so earnestly presented in a preceding section[2] that the total prohibition of the sale of intoxicating liquors is unconstitutional, the establishment of a municipal monopoly in the sale of liquors would be in the same category with the Massachusetts provision for the sale by the town to private consumers of wood and coal, which was held to be an unconstitutional extension of the functions of municipal government. But having declared that the liquor trade was so inherently injurious to the public interests, when left to unrestricted enterprise, as to justify constitutionally the total prohibition of the trade, the courts could not consistently deny the right of the legislature to convert it into a municipal monopoly; unless the doctrine was upheld that governmental

functions could not be extended to include the satisfaction of any wants of the individual; a doctrine which, as has been seen, has been repudiated by the courts.

So far I have confined myself to the consideration of the cases of government monopoly and engagement in what have heretofore been characterized as private businesses, in which city governments have been authorized by their charters or by special statutes to thus extend their functions; in deference to the opinion which has been expressed by the courts, that in this connection a distinction is properly made between city governments and the State or county governments; on the theory, already stated, that cities, as incorporated bodies, have a public and a quasi-private character, and that the city exercises the extraordinary function of vending water or light to private consumers in its *quasi-private* and not in its *public* character. However sound this theory of the dual character of municipal corporation may be, in connection with the claims of creditors, and the right of the courts to compel the city to pay its debts; it seems to me to be incontrovertible that, in prohibiting a trade to private individuals and converting it into a municipal monopoly, the city is exercising a function of government, and is therefore acting in its public character, as a local branch of the State government. If the State legislature may authorize a city to create municipal monopolies out of water works, gas and electric light plants, street railways, liquor trade, etc., without violating any provision of the State constitution; the legislature may equally establish these and kindred businesses as State government monopolies, unless the State constitution contains some provision, which distinguishes in such matters between the functions of State and municipal governments.

The same rule would apply to the scope of power of the national government, so far as its jurisdiction extends over the subjects of police power. So far as there have been adjudications on the subject, the contentions of the text have been fully sustained by the courts.

Up to the present time, there have been only two cases in which government monopolies have been established, outside of the municipal monopolies, and which have been sustained by the courts. And these are (1) the transportation and distribution of the mails by the United States officials and (2) the sale of intoxicating liquors by the officers of the State of South Carolina.

The right of the national government to make an exclusive government monopoly of the postal service has never been questioned in any judicial proceeding. The universality of this government monopoly, throughout the civilized world, would, according to the principle of constitutional construction, adopted in the case of Juillard *v.* Greeman,[1] have been a complete answer to any question of the constitutional power of the national government to establish post offices and post roads; even if the United States constitution had not expressly authorized the national governernment to establish and maintain them as government monopolies.

If a political party were to go before the people on the declaration, that it proposes, if successful at the polls, to convert all the railroads and telegraph lines into government monopolies, to buy under condemnation proceedings the existing lines of railroad and

telegraph, or establish new ones, and prohibit the existing railroad and telegraph companies from conducting their respective businesses; an intense excitement would prevail all over the country. Apart from the economic objections, which would be urged against the program, many would feel that the government would thereby intrench upon the fields of private enterprise, without constitutional authority. But if it is lawful for the government to establish and maintain a postal service as an exclusive government monopoly, there can be no legal or scientific objection to the conversion of the railroads and the telegraph or telephone service into government monopolies. The same reasons which justify the post-office monopoly would be sufficient to justify these. They are all common means, now made, by the exigencies of modern life, necessary means of intercourse and intercommunication among people of the same and of different countries, and might very properly be compared with the governmental control of the public highways on land and on water. Then again, these means of communication are so necessary to the prosecution of the trade and commerce of the world, that any interruption of them by disputes of the railroads and telegraph lines with their employees over wages and terms of hiring or with the shippers of goods and travelers over rates of charges, would be and have been often a serious menace to the public welfare. Whatever serious doubts may be entertained concerning the political propriety of such government monopolies; in these days of labor agitation and gigantic railroad and telegraph combinations, and in the face of the charges of extortion of these combinations, alike toward patrons and employees;[1] when a strike of railroad and telegraph employees may extend over the whole country, stop the wheels of commerce and bring all commercial intercourse to an end, as long as the disagreement continues, public opinion may not, after a thoughtful consideration of these things, reject the proposition. Certainly, the courts would not deny to the national government the power thus to extend the scope of its functions. No private corporation or syndicate of capitalists should be vested with the ownership and control of any of the means of intercourse or communication of people with each other. Apart from the opportunities for the practice of extortion, which the private ownership of such means of communication affords, the grant of them to private corporations is a violation of the constitutional guaranty of equal privileges and immunities. The United States Supreme Court has declared, in two cases,[2] that it would be lawful for Congress to make government monopolies of the railroad and the telegraph, to construct the same anew or to appropriate to its use, in the exercise of the right of eminent domain, the existing lines of railroad and telegraph. This was only a dictum, but it may be taken as a reliable forecast of what the decision of that court would be if the question should ever come before it.[1]

The South Carolina Dispensary Law has not only been the occasion of a great deal of bitter political animosity within the State, but it has also provoked a widespread discussion throughout the country, in the public press, as well as in the legal journals, over this extension of the functions of government. Briefly stated, the dispensary law, so-called, prohibits all private trade in intoxicating liquors within the State of South Carolina, and provides for its sale by officials of the State government, under strict regulations as to the amounts to be sold, and expressly forbidding all drinking at the place of sale. This was a clear establishment in the sale of intoxicating liquors of a government monopoly. And, naturally, the private liquor dealers of the State sought to secure the nullification of this law, aided and abetted by the strong political acrimony

which the political divisions of recent years have engendered in that State. The result of the first case was a pronouncement of the unconstitutionality of the law, in an able opinion from Chief Justice McIver.2 Chief Justice McIver said in part:—

"But it is earnestly contended by the attorney-general that if the power to prohibit absolutely the sale of intoxicating liquors be conceded, it follows necessarily that the State may assume the monopoly of such a trade; and in support of this view he cites Tiedeman on the Limitations of the Police Power (page 318), where that author uses the following language: 'There is no doubt that a trade or occupation which is inherently and necessarily injurious to society may be prohibited altogether; and it does not seem to be questioned that the prosecution of such a business may be assumed by the government, and managed by it as a monopoly.' But the only authority which the author cites to sustain this rather extraordinary proposition is the case of State *v.* Brennan's Liquors, 25 Conn. 278, overlooking entirely the case of Beebe *v.* State, 6 Ind. 503, which holds an opposite view, and which had been previously cited by the same author at page 197, and quoted from, apparently with approval; but, in addition to this, we are unable to perceive how the right to prohibit a given traffic carries with it the power in the State to assume the monopoly of such traffic. If the right to prohibit the sale of intoxicating liquors rests upon the ground that such a traffic 'is inherently and necessarily injurious to society,'1 as is involved in the statement by the author of this proposition, then it seems to us that the logical and necessary consequence would be that the State could not engage in such traffic, for otherwise we should be compelled to admit the absurd proposition that a State government established for the very purpose of protecting society could lawfully engage in a business which 'is inherently and necessarily injurious to society.' We must prefer, then, to follow the case of Beebe *v.* State, rather than State *v.* Brennan's Liquors; for while it has been said that the case of Beebe *v.* State has been overruled (though the case to that effect has not been brought to our attention), yet we do not cite the case as authority, for it is not authority here, but it is only referred to for the reasoning contained in the opinion. Indeed, neither the Indiana nor the Connecticut case could constitute authority in this case, for the reason that the statute which we are called upon to construe contains very different provisions from those found either in the Indiana or Connecticut statutes. But in this connection we are enabled to cite a very recent case, which the research of counsel for respondents has furnished us with, which, it seems to us, is as conclusive of this whole matter as any case from abroad can be. That is the case of Rippe *v.* Becker (Minn.) 57 N. W. 331, in which one of the points distinctly decided is thus stated in the syllabus, prepared by the court: 'The police power of the State to regulate a business is to be exercised by the adoption of rules and regulations as to the manner in which it shall be conducted by others, and not by itself engaging in it.' In that case the question was as to the constitutionality of an act entitled 'An act to provide for the purchase of a site and for the erection of a State elevator or warehouse at Duluth for public storage of grain,' and one of the grounds upon which it was sought to sustain the constitutionality of the act was that it was an exercise of the police power. But the court held that, while 'the right of the State, in the exercise of its police power, to regulate the business of receiving, weighing, inspecting, and storing grain in elevators and warehouses, as being a business affected with a public interest, is now settled beyond all controversy' by the case of Munn *v.* Illinois, 94 U. S. 113, and others on the same line, yet 'that the act

there in question could not be regarded as a police regulation of the business, and that the police power of the State to regulate a business does not include the power to engage in carrying it on.' It would extend this opinion to an unwarrantable length to make further quotations from the opinion of the court in that case, which might be instructive and profitable. It seems to us, therefore, that in no view of the case can the dispensary act be regarded as a police regulation of the business of selling intoxicating liquors, and, even if it could be, that such police power does not include the power on the part of the State to engage in carrying on such business.

"Finally, the constitutionality of the dispensary act is assailed upon the ground that the legislature have undertaken thereby to embark the State in a trading enterprise, which they have no constitutional authority to do; not because there is any express prohibition to that effect in the constitution, but because it is utterly at variance with the very idea of civil government, the establishment of which was the expressly declared purpose for which the people adopted their constitution; and therefore all the powers conferred by that instrument upon the various departments of the government must necessarily be regarded as limited by that declared purpose. Hence when, by the first section of the second article of the constitution, the legislative power was conferred upon the general assembly, the language there used cannot be construed as conferring upon the general assembly the unlimited power of legislating upon any subject, or for any purpose, according to its unrestricted will, but must be construed as limited to such legislation as may be necessary or appropriate to the real and only purpose for which the constitution was adopted, to wit, the formation of a civil government. In this connection it is noticeable that the word 'all' is not used in the section above referred to, but the language used is, 'the legislative power,' meaning such legislative power as may be necessary or appropriate to the declared purpose of the people in framing their constitution and conferring their powers upon the various departments constituted for the sole purpose of carrying into effect their declared purpose. It is manifest from the numerous express restrictions upon the legislative will found in the constitution that the people were not willing to entrust even their own representatives with unlimited legislative power, but, as if not satisfied with these numerous express restrictions, and perhaps fearing that some important right might have been overlooked, a general clause, not usually found in State constitutions, was inserted, apparently designed to cover any such omissions, for in section 41 of article 1 it is expressly declared that 'the enumeration of rights in this constitution shall not be construed to impair or deny others retained by the people, and all powers not herein delegated remain with the people.' Now, upon well-settled principles of constitutional construction we are not at liberty to disregard this clause, but must give it some meaning and effect. It seems to us that the true construction of this clause is that, while there are many rights which are expressly reserved to the people, with which the legislature are forbidden to interfere, there are other rights reserved to the people not expressly but by necessary implication, which are beyond the reach of the legislative power, unless such power has been expressly delegated to the legislative department of the government. These views have not only the support of the highest authority in this country, as may be seen by reference to the cases of Loan Assn. *v.* Topeka, 20 Wall. 655, and Parkersburg *v.* Brown, 106 U. S. 487, 1 Sup. Ct. 442, but have been distinctly adopted by the Supreme Court of the State in Feldmann *v.* City Council, 23 S. C. 57, as well as by the courts of Massachusetts and Maine, as may be

seen by reference to Allen *v.* Jay, 60 Me. 124, and Lowell *v.* City of Boston, 111 Mass. 454; and, what is more, they were applied to the vital power of taxation—a power absolutely essential to the very existence of every government. These cases substantially hold that, although there may be no express restrictions contained in a State constitution forbidding the imposition of taxes for any other purpose than a public purpose, yet such a restriction must necessarily be implied from the very nature of civil government; and hence the legislative department, under the general power of taxation conferred upon it, cannot impose any tax except for some public purpose. Upon the same principle it seems to us clear that any act of the legislature which is designed to, or has the effect of, embarking the State in any trade which involves the purchase and sale of any article of commerce for profit, is outside and altogether beyond the legislative power conferred upon the general assembly by the constitution, even though there may be no express provision in the constitution forbidding such an exercise of legislative power. Trade is not, and cannot properly be, regarded as one of the functions of government. On the contrary, its function is to protect the citizen in the exercise of any lawful employment, the right to which is guaranteed to the citizen by the terms of the constitution, and certainly has never been delegated to any department of the government.

"We do not deem it necessary to go into any extended consideration of the fearful consequences of recognizing the power of the legislature to embark the State in any trade, arising from the hazards of all business of that character, or to comment upon the danger to the people of the monopoly of any trade by the State,—for if it can monopolize one it may monopolize any or all other trades or employments,—although it is permissible for a court, when called upon to construe an act, to consider its effects and consequences; for it may be said—indeed, has been said—that the good sense and patriotism of the members of the general assembly may be safely relied upon to protect the people from such apprehended dangers."

After the rendition of this opinion against the constitutionality of the dispensary law, a change in the personnel of the Supreme Court of South Carolina occurred, which resulted in producing a preponderance of judicial opinion in favor of the constitutionality of the law. When a case came before the court again, which involved this question of constitutionality of the dispensary law, the opinion of the court in McCullough *v.* Brown, just cited, was expressly overruled, and the constitutionality of the law was sustained.[1] Judge Gary, in delivering the opinion of the court, said:—

"Objection is made as to the constitutionality of the act on the ground that it creates a monopoly. Those interposing this objection likewise assume that it is not a police measure. The objection is fully met by the decision of the court in the Slaughter-house Cases, *supra,* in which the court says: 'That wherever the legislature has the right to accomplish a certain result, and that result is best attained by means of a corporation, it has the right to create such a corporation, and to endow it with the power necessary to effect the desired lawful purpose, seems hardly to admit of debate.' Tied. Lim. 318, says: 'If it is lawful for the State to prohibit a particular business altogether, or to make a government monopoly of it, the pursuit of such business would, if permitted to any one, be a privilege or franchise, and being like any other franchise, may be made exclusive. This is but a logical consequence of the admission that the State has the

power to prohibit a trade altogether. Such an admission is fatal to a resistance of the power to make it a monopoly.' The doctrine of 'monopoly' cannot be applied to a State in exercising its governmental functions. * * *

"It is contended that the foregoing section1 prevents the legislature from embarking the State in a commercial enterprise. We have no doubt that if such was the object of the act, and it was not intended as a police measure, it would be unconstitutional, even in the absence of section 41, art. 1. As we have said, if the act is not a police measure, it is unconstitutional. It is quite a different thing, however, when trade is simply an incident to a police regulation. Buying and selling on the part of the Federal, State, and municipal governments take place every day, and as long as the buying and selling are in pursuance of police regulations they are entirely free from legal objection. The Federal government sells liquor and other articles that have been seized as contraband. Articles are purchased by the State to keep up the penitentiary and asylum and other public institutions and enterprises. We see it buying a farm to utilize the convict labor of the State, and selling the produce made on the farm. Municipal governments have the right to buy and dispose of property in administering their governmental affairs. The very distinction for which we contend is pointed out in the case of Mauldin *v.* City Council, 33 S. C. 1; 11 S. E. 434. In that case the court showed it was not wrong for the city to buy and sell for a public purpose, but that the act only became illegal when it was for a private purpose. We think the case was properly decided, and that the decision rested upon this distinction. The case of Beebe *v.* State, 6 Ind. 501, was upon the construction of a statute of Indiana somewhat similar to the act in question, and is relied upon as an authority to sustain the proposition that the State cannot take direct control and management of the liquor traffic. In that case the court uses the following language: 'The business [the management and sale of liquor] was at and before the organization of the government, and is properly at all times, a private pursuit of the people, as much so as the manufacture and sale of *brooms, tobacco, clothes,* and the dealing in *tea* and *rice,* and the raising of *potatoes.*' (Italics ours.) This case is in conflict with the distinction made between liquor and the ordinary commodities of life. * * *

"If liquor is to be placed on the same footing with the articles mentioned in the Indiana case, then that decision was right; but if there is that distinction for which we contend, then the case is valueless as an authority, being decided on erroneous principles. The principles upon which that case was decided would have forced the court that rendered it to have declared null and void a statute entirely prohibiting the traffic in liquor, although there is no longer any doubt as to the constitutionality of such statutes. The case of Rippe *v.* Becker (Minn.), 57 N. W. 331, is also relied upon to sustain the constitutional objection to the act of 1893. The title of the act construed in Rippe *v.* Becker was, 'An act to provide for the purchase of a site and for the erection of a State elevator or warehouse at Duluth for public storage of grain.' The syllabus of the case prepared by the court states: 'The police power of the State to regulate a business is to be exercised by the adoption of rules and regulations as to the manner in which it shall be conducted by others, and not by itself engaging in it.' The language of the court as applying to that case was proper, and we think the case was properly decided in the light of the distinction between liquor and the ordinary commodities of life which we have pointed out. There was nothing in the business

dangerous to the health, morals, and safety of the people, and the act should have been declared null and void."

I believe the latter South Carolina case to be sound law.1 But the reader must bear in mind that this opinion is predicated upon the proposition, that the liquor trade is so inherently injurious to society, when it is permitted to be the object of private enterprise, as that the State is for that reason justified in prohibiting altogether its prosecution by private individuals as an ordinary calling. This I do not believe to be the case, and I adhere to the opinion expressed in the preceding section2 that all laws, which prohibit altogether the private manufacture and sale of intoxicating liquors, are unconstitutional as an unjustifiable interference with the liberty of the individual to engage in any lawful calling.

A case in the Minnesota Supreme Court, which is referred to in the South Carolina cases on the Dispensary Law, as aptly illustrates the limitations of the legislative power to convert private businesses into government monopolies, as do the Massachusetts cases, heretofore referred to in the present section, point out the limitations in the same direction of the power of municipal governments.3 The legislature of Minnesota had provided for the erection and maintenance by the State of a grain elevator at Duluth. It will be remembered that these grain elevators have been pronounced by the United States Supreme Court and by the Court of Appeals of New York, to be virtual monopolies, and properly subjected to the police regulation of rates and charges.4

The intention of this novel legislation, as stated in section 4 of the Minnesota act, authorizing the establishment of the government elevators, is as follows: it being the intention of this act to prevent monopolization and the unjust control of the markets of the State for farm products. The Supreme Court declared the act to be unconstitutional and said:—

"The keynote to the object of the law is, we apprehend, to be found in the last clause of section 4 above quoted as to the intention of the act; and, so far as it relates to the right of the State, under the police power, to regulate this business the position of defendant's counsel really amounts to this: that whenever those who are engaged in any business which is affected with a public interest and hence the subject of governmental regulation, do not furnish the public proper and reasonable service, the State may, as a means of regulating the business, itself engage in it, and furnish the public better service at reasonable rates, or by means of such State competition, compel others to do so. * * * The police power of the State to regulate a business does not include the power to engage in carrying it on. Police regulation is to be affected by restraints upon a business, and the adoption of rules and regulations as to the manner in which it shall be conducted."

The Supreme Court of Minnesota very correctly declares the act to be unconstitutional, but assigns what appears to me to be an erroneous reason for its judgment, so far as it declares that the police power does not include the power to make a government monopoly of a business, when that is in the estimation of the government the only effective measure for the prevention of the injuries and wrongs,

which the public suffer from the prosecution by private individuals of a business which is inherently and necessarily injurious to society, when it is left open to private enterprise. But the business of storage of grain in elevators is not of that kind. It is not inherently and necessarily injurious when left open to private enterprise. The only danger with which the public is threatened in such a business, is that of extortionate charges for the storage of grain. Police regulation of the maximum charges is unquestionably an ample protection, and the legislature is not justified in converting such a business into a government monopoly, or in providing for the engagement of the government in the business, in competition with the private grain elevators.

Before concluding this discussion of the power of the legislature to create government monopolies, I have one more reflection to make. In preceding sections1 I have set forth at considerable length the governmental efforts to suppress trade combinations, and the principles of constitutional law, which limit and justify these police regulations. In other preceding sections2 I have explained how the constitutional declarations, of the equality of all men before the law, constrain the courts in a variety of cases to declare unconstitutional statutes, which interfere with the liberty of contract of the individual. In another section3 I pointed out that all attempts to suppress and prevent combinations in restraint of trade must necessarily prove futile, as long as the statutes of the State permit the creation of private corporations, for the prosecution of businesses, which can be successfully carried on by private individuals without the aid of a charter of incorporation. The grant of charters of incorporation in such cases only serves to intensify the natural power which the capitalist in his individual capacity posseses over the non-capitalist, by the mere possession of the capital. I advocate, as a return to a uniform recognition of the constitutional guaranty of equality before the law, the repeal of the statutes which provide for the creation of private corporations. But there are, undoubtedly, businesses, which, on account of their immense proportions and wide scope, cannot be successfully and safely conducted by private capitalists, without the aid of a charter of incorporation, and where the business is not at all dependent upon the grant by the legislature of any special privilege or franchise, such as the railroad or telegraph company. As possible examples of that kind of business, may be mentioned the business of insurance and of banking.1

It is possible for the banking business and the business of all kinds of insurance other than life to be successfully carried on by private enterprise; it is absolutely impossible on account of the long duration of its policies, for life insurance to be so conducted. I may be wrong in this distinction; I do not care to be insistent upon it. But if it should be judicially declared to be impossible for these businesses to be carried on by private capitalists in their individual capacity; and that incorporation is necessary to their successful prosecution; I insist that the grant of a charter of incorporation of a bank or of an insurance company is as much a grant of a special privilege or franchise, in violation of the constitutional guaranty of equal privileges and immunities, as is the grant of a charter to a railroad or street railway company. Assuming it to be true that banking and insurance, or either of them, cannot be successfully conducted by natural persons without the aid of incorporation, the only method of providing for such businesses, which is consonant with the democratic principles of equality, is by their conversion into government monopolies.

But I do not desire to be understood as justifying the creation of a government monopoly in a case, in which the individual cannot in his individual capacity successfully conduct the business on so large a scale as it is now being managed under a charter of incorporation. If the business can be successfully conducted by a private individual on a smaller scale, and with a reasonable protection to parties having dealings with him—according to the principles here advocated, and laid down in adjudications on kindred propositions of law,—that business cannot be converted into a government monopoly, without infringing the constitutional right of the individual to pursue any lawful calling he may select. The demonstration of the fact, that when the business is conducted on a larger scale, there is a marked saving of the expense, and a consequent reduction in the price to the consumer, does not affect the constitutional aspect of the question. The Supreme Court of the United States, in the Trans-Missouri Freight Association case,1 does not declare it to be of any concern to the government that the prices of products should be reduced at the expense of the liberty of the individual to pursue a lawful calling; it asserts the contrary proposition, that it is the concern of the government, which is manifested by the legislation against trusts and trade combinations, that the small tradesman, manufacturer and artisan, shall not be driven to the wall, overpowered by the giant combinations.

The application of these principles to practical politics is very likely to result in an abuse of them. The student of European politics meets with all sorts of monopolies, almost as varied as they were in France under the ancient *régime,* the only difference being that the general government, and not the privileged classes, own the monopolies. There may in the future be attempts in this country to create monopolies out of trades and occupations, the prosecution of which by private individuals would be successful, and would not necessarily inflict injury upon the public. But a resort to the courts will furnish an ample remedy, if public opinion has not grown accustomed to a disregard of constitutional limitations and of the rights of individuals. It is confidently believed that the exposition in this chapter of the adjudications, bearing upon the constitutionality of police regulations of trades and occupations, reveals such a clear desire on the part of the courts to strengthen the constitutional limitations upon legislative tyranny, that we can look with assurance to the judicial veto as an insuperable barrier, at least for years to come, to the establishment of State socialism.

[1]I do not here undertake to do more than to state those conceptions of natural rights which have by adjudications been embodied in American Constitutional law. The scientific criticisms by Austin and others of the theory of Natural Rights, will be found properly recognized and discussed in the author's "Unwritten Constitution of the United States," and in his "Liberty and Equality in the United States."

[1]Redfield, C. J., in Thorpe *v.* Rutland, etc., R. R., 27 Vt. 140.

[2]4 Bl. Com. 162.

[3]Cooley, Const. Lim. 572.

[1]The following other definitions present the same ideas in different language, but they are added, *ex abundante cautela,* with the hope that they may assist in reaching a

clear conception of the scope of the police power. "The police power of a State is co-extensive with self-protection, and is not inaptly termed 'the law of overruling necessity.' It is that inherent and plenary power in the State, which enables it to prohibit all things hurtful to the comfort and welfare of society." Lakeview *v.* Rose Hill Cemetery, 70 Ill. 192. "With the legislature the maxim of law '*salus populi suprema lex,*' should not be disregarded. It is the great principle on which the statutes for the security of the people are based. It is the foundation of criminal law, in all governments of civilized countries, and of other laws conducive to the safety and consequent happiness of the people. This power has always been exercised, and its existence cannot be denied. How far the provisions of the legislature can extend, is always submitted to its discretion, *provided its acts do not go beyond the great principle of securing the public safety,* and its duty to provide for the public safety, within well defined limits and with discretion, is imperative. * * * All laws for the protection of lives, limbs, health and quiet of the person, and for the security of all property within the State, fall within this general power of government." State *v.* Noyes, 47 Me. 189. "There is, in short, no end to these illustrations, when we look critically into the police of large cities. One in any degree familiar with this subject would never question a right depending upon invincible necessity, in order to the maintenance of any show of administrative authority among the class of persons with which the city police have to do. To such men any doubt of the right to subject persons and property to such regulations as public security and health may require, regardless of mere private convenience, looks like mere badinage. They can scarcely regard the objector as altogether serious. And, generally, these doubts in regard to the extent of governmental authority come from those who have had small experience." Hale *v.* Lawrence, 1 Zab. 714; 3 Zab. 590. While it is true that a small experience in such matters is calculated to increase one's doubts in respect to the exercise of the power, a large and practical experience is likely to make one recklessly disregardful of private rights and constitutional limitations.

[1]Bluntschli, Mod. Stat., vol. II., p. 276. See *v.* Mohl's comprehensive discussion of the scope of Police Power in the introductory chapter to his Polizeiwissenschaft.

[1]Thorpe *v.* Rutland, etc., R. R., 27 Vt. 150.

[2]152 U. S. 133.

[1]112 Cal. 468.

[1]On the general tendency of development of police power in Illinois see Eden *v.* People, 161 Ill. 296.

[1]Judge Chase in Calder *v.* Bull, 3 Dall. 386; Judge Story in Wilkinson *v.* Leland, 2 Pet. 657; Judge Bronson in Taylor *v.* Porter, 4 Hill, 145; Judge Strong in People *v.* Toynbec, 20 Barb. 218; Judge Hosmer in Goshen *v.* Storlington, 4 Conn. 259; Chancellor Walworth in Varick *v.* Smith, 5 Paige, 137; Judge Spaulding in Griffith *v.* Commissioners, 20 Ohio, 609; Ch. J. Parker, in Ross' Case, 2 Pick. 169.

[1]"The question whether the act under consideration is a valid exercise of legislative power is to be determined solely by reference to constitutional restraints and prohibitions. The legislative power has no other limitation. If an act should stand when brought to the test of the constitution, the question of its validity is at an end, and neither the executive nor judicial department of the government can refuse to recognize or enforce it. The theory, that laws may be declared void when deemed to be opposed to natural justice and equity, although they do not violate any constitutional provision, has some support in the *dicta* of learned judges, but has not been approved, so far as we know, by any authoritative adjudication, and is repudiated by numerous authorities. Indeed, under the broad and liberal interpretation now given to constitutional guaranties, there can be no violation of fundamental rights, which will not fall within the express or implied prohibition and restraints of the constitution and it is unnecessary to seek for principles outside of the constitution, under which legislation may be condemned." Bertholf *v.* O'Reilly, 74 N. Y. 509. "Defendant insists that we should pronounce the law now in question to be void, on the ground that it is opposed to natural right and the fundamental principles of civil liberty. We are by no means prepared to accede to the doctrine involved in this claim, that under a written constitution like ours, in which the three great departments of government, the executive, legislative and judicial, are confided to distinct bodies of magistracy, the powers of each of which are expressly confined to its own proper department, and in which the powers of each are unlimited, in its appropriate sphere, except so far as they are abridged by the constitution itself, it is competent for the judicial department to deprive the legislature of powers which they are not restricted from exercising by that instrument. It would seem to be sufficient to prevent us from thus interposing, that the power exercised by the legislature is properly legislative in its character, which is unquestionably the case with respect to the law we have been considering, and that the consideration contains no restrictions upon its exercise in regard to the subject of it." State *v.* Wheeler, 25 Conn. 290. See, also, Butler *v.* Palmer, 1 Hill, 324; Cochran *v.* Van Surley, 20 Wend. 380; Grant *v.* Courten, 24 Barb. 232; Benson *v.* Mayor, 24 Barb. 248, 252; Wynehamer *v.* People, 13 N. Y. 390; Town of Guilford *v.* Supervisors, 13 N. Y. 143; Sharpless *v.* Mayor, 21 Pa. St. 147; Bennett *v.* Boggs, 1 Bald. 74; Doe *v.* Douglass, 8 Blackf. 10; State *v.* Clottu, 33 Ind. 409; Stein *v.* Mayor, 24 Ala. 614; Dorman *v.* State, 34 Ala. 232; Boston *v.* Cummings, 16 Ga. 102; Hamilton *v.* St. Louis Co., 15 Mo. 23; Powell *v.* Com., 114 Pa. St. 265; Reeves *v.* Corning, 51 Fed. 774; Sinking Fund Cases, 99 U. S. 700, 718. "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule." See, also, Fletcher *v.* Peck, 6 Cranch, 87, 128; Dartmouth College *v.* Woodward, 4 Wheat. 518, 625; Livingston *v.* Darlington, 101 U. S. 407.

[1]Reference is here made to those numerous monopolies, created in various industries for the benefit of certain powerful families and made hereditary, which proved beneficial to their possessors, while they were correspondingly oppressive to the poorer classes. This was one of the crying evils of the old French civilization which led up to the Revolution.

[1]Bertholf *v.* O'Reilly, 74 N. Y. 509

[2]Yick Wo *v.* Hopkins, 118 U. S. 356.

[1]Judge Redfield's annotation to People *v.* Turner, 55 Ill. 280; 10 Am. Law Reg. (n. s.) 372. At a very early day, before the adoption of the present constitution of the United States, it was judicially decided in Massachusetts that slavery was abolished in that State by a provision of the State constitution, which declared that "all men are born free and equal, and have certain natural, essential and inalienable rights," etc. This clause was held to be inconsistent with the *status* of slavery, and therefore impliedly emancipated every slave in Massachusetts. See Draper, Civil War in America, vol. I., p. 317; Bancroft, Hist. of U. S. vol. x., p. 365; Cooley Principles of Const., p. 213.

[1]Christiancy, J., in People *v.* Jackson and Mich. Plank Road Co., 9 Mich. 285.

[2]Lake View *v.* Rose Hill Cemetery, 70 Ill. 192.

[3]1 Cranch, 137.

[1]U. S. Const., art. I., § 9.

[2]U. S. Const., art. I., § 10.

[3]U. S. Const., art. I., § 10.

[4]U. S. Const. Amend., art. VIII.

[5]U. S. Const. Amend., art. IV.

[6]U. S. Const. Amend., art. III.

[7]U. S. Const. Amend., art. II.

[8]U. S. Const. Amend., art. I.

[1]U. S. Const. Amend., art. V.

[2]U. S. Const. Amend., art. V.

[3]U. S. Const. Amend., art. VIII.

[4]U. S. Const., art. I., § 9.

[5]U. S. Const. Amend., art. XIV.

[1]U. S. Const. Amend., art. XV.

[2]Barron *v.* Baltimore, 7 Pet. 243; Livingston's Lessee *v.* Moore, *Ib.* 469; Fox *v.* Ohio, 5 How. 410; Smith *v.* Maryland, 18 How. 71; Parvear *v.* Com., 5 Wall. 475; Twitchell *v.* Com., 7 Wall. 321; Com. *v.* Hitchings, 5 Gray, 482; Bigelow *v.* Bigelow, 120 Mass. 300, etc.

[1]4 Bl. Com. 188, 189.

[2]See *post,* § 60.

[3]See *post,* § 60.

[1]4 Bl. Com. 8.

[2]4 Bl. Com. 8.

[1]4 Bl. Com. 18.

[2]4 Bl. Com. 9.

[3]U. S. Const. Amend., art. 8.

[4]Done *v.* People, 5 Park. 364. In People *v.* Durston, 119 N. Y. 569, and People *v.* Kemmler, 119 N. Y. 580, in which the New York statute, directing the infliction of the death penalty by electricity, was held to be constitutional, the court declared that this was not a new punishment, but only a new method of inflicting capital punishment. And where a new method of inflicting the same punishment was directed by statute, its constitutionality can be successfully attacked only by proving that the new method would produce extreme and unnecessary suffering. In other words, a new punishment must be both cruel and unusual, in order to fall under the ban of this constitutional provision. See, also, in confirmation of these New York cases, *In re* Kemmler, 136 U. S. 436, in which it is held that the New York statute does not violate the Fourteenth Amendment of the Constitution of the United States, by imposing a cruel punishment. See *post,* § 31, as to the application of this constitutional provision to the punishment of crimes in general.

[1]Cooley Const. Lim. 403, 404.

[1]4 Bl. Com. 402-404.

[2]"Without such security society loses most of its value. Peace and order and domestic happiness, inexpressibly more precious than mere forms of government, cannot be enjoyed without the sense of perfect security." Gilchrist, J., in Beach *v.* Hancock, 27 N. H. 223.

[3]In Maryland it has been revived as a punishment for wife-beating.

[1]Taylor, Ch. J., in State *v.* Kearney, 1 Hawks, 53.

[2]"Among all nations of civilized man, from the earliest ages, the infliction of stripes has been considered more degrading than death itself." Herber *v.* State, 7 Texas, 69.

[3]Cooley Const. Lim. *330.

[1]Commonwealth *v.* Wyatt, 6 Rand. 694; Foote *v.* State, 59 Md. 264 (for wife-beating); Garcia *v.* Territory, 1 New Mex. 415. In the last case, the corporal punishment was inflicted for horse-stealing.

[2]Cornell *v.* State, 6 Lea, 624. This power is exercised generally throughout the country; it is hard to say, to what extent with the direct sanction of law.

[3]1 Bishop Crim. Law, § 722. Under the national government, both the whipping-post and the pillory were abolished by act of Congress in 1839. 5 U. S. Stat. at Large, ch. 36, § 5.

[4]See *post,* §§ 191, 195, 203.

[1]Bartlett *v.* Churchhill, 24 Vt. 218; Elliott *v.* Brown, 2 Wend. 497; Murray *v.* Commonwealth, 79 Pa. St. 311; Lewis *v.* State, 51 Ala. 1; McPherson *v.* State, 29 Ark. 225; Holloway *v.* Commonwealth, 11 Bush, 344; Erwin *v.* State, 29 Ohio St. 186; Roach *v.* People, 77 Ill. 25; State *v.* Kennedy, 20 Iowa, 569; State *v.* Shippen, 10 Minn. 223.

[1]4 Bl. Com. 217. See People *v.* Sullivan, 7 N. Y. 396; State *v.* Dixon, 75 N. C. 275; Haynes *v.* State, 17 Ga. 465; Tweedy *v.* State, 5 Iowa, 433.

[2]Shorter *v.* People, 2 N. Y. 193; Patterson *v.* People, 46 Barb. 625.

[3]Elem. c. 5.

[4]4 Bl. 186.

[1]Reg *v.* Dudley, 15 C. C. 624; 14 L. R. Q. B. Div. 273, 560; 54 L. J. M. C. 32, 52. See the Mignonette Case, 19 Am. Law Rev. 118.

[2]Staten *v.* State, 30 Miss. 619; Briggs *v.* State, 29 Ga. 733.

[3]Commonwealth *v.* Malone, 114 Mass. 295; Stoneman *v.* Commonwealth, 25 Gratt. 887; State *v.* Johnson, 75 N. C. 174; Staten *v.* State, 30 Miss. 619; Patten *v.* People, 18 Mich. 314.

[4]Green *v.* Goddard, 2 Salk. 641; Beecher *v.* Parmele, 9 Vt. 352; Harrison *v.* Harrison, 43 Vt. 417; Ayers *v.* Birtch, 35 Mich. 501; Woodman *v.* Howell, 45 Ill. 367; Abt *v.* Burgheim, 80 Ill. 92; Staehlin *v.* Destrehan, 2 La. Ann. 1019; McCarty *v.* Fremont, 23 Cal. 196.

[1]State *v.* Burwell, 63 N. C. 661; McPherson *v.* State, 22 Ga. 478; State *v.* Abbott, 8 W. Va. 741; Pitford *v.* Armstrong, Wright (Ohio), 94; Wall *v.* State, 51 Ind. 453; Pond *v.* People, 8 Mich. 150; State *v.* Stockton, 61 Mo. 382; Palmore *v.* State, 29 Ark. 248.

[2]State *v.* Vance, 17 Iowa. 138. See Loomis *v.* Terry, 17 Wend. 496. See, also, Bird *v.* Holbrook, 4 Bing. 628; Aldrich *v.* Wright, 53 N. H. 398 (16 Am. Rep. 339); Hooker *v.* Miller, 37 Iowa, 613 (18 Am. Rep. 18), where it is held that the use of spring guns and other like instruments, which cause the death of trespassers upon the land, is not permissible.

[3]Commonwealth *v.* Haley, 4 Allen, 318; Sampson *v.* Henry, 13 Pick. 336; Churchill *v.* Hulbert, 110 Mass. 42 (14 Am. Rep. 578).

[4]Cockroft *v.* Smith, 11 Mod. 43; Barfoot *v.* Reynolds, 2 Stra. 953; State *v.* Gibson, 10 Ired. 214.

[5]Tiedeman on Real Property, § 228.

[1]Reeder *v.* Pardy, 41 Ill. 261; Doty *v.* Burdick, 83 Ill. 473; Knight *v.* Knight, 90 Ill. 208; Dustin *v.* Cowdry, 23 Vt. 631; Whittaker *v.* Perry, 38 Vt. 107 (but see *contra* Beecher *v.* Parmelee, 9 Vt. 352; Mussey *v.* Scott, 32 Vt. 82). See Moore *v.* Boyd, 24 Me. 247.

[2]Harvey *v.* Brydges, 13 M. & W. 437; Davis *v.* Burrell, 10 C. B. 821; Hilbourne *v.* Fogg, 99 Mass. 11; Churchill *v.* Hulbert, 110 Mass. 42 (15 Am. Rep. 578); Clark *v.* Kelliher, 107 Mass. 406; Stearns *v.* Sampson, 59 Me. 569 (8 Am. Rep. 442); Sterling *v.* Warden, 51 N. H. 239 (12 Am. Rep. 80); Livingston *v.* Tanner, 14 N. H. 64; Estes *v.* Redsey, 8 Wend. 560; Kellum *v.* Jansorn, 17 Pa. St. 467; Zell *v.* Reame, 31 Pa. St. 304; Todd *v.* Jackson, 26 N. J. L. 525; Walton *v.* Fill, 1 Dev. & B. 507; Johnson *v.* Hanahan, 1 Strobh. 313; Tribble *v.* Frame, 1 J. J. Marsh. 599; Krevet *v.* Meyer, 24 Mo. 107; Fuhr *v.* Dean, 26 Mo. 116. But where force is used after a peaceable entry to eject a tenant, it is lawful and will not sustain a prosecution for assault and battery. Stearns *v.* Sampson, 59 Me. 569 (8 Am. Rep. 442).

[1]1 Bl. Com. 154.

[2]Commonwealth *v.* Parker, 9 Metc. 263; State *v.* Cooper, 22 N. J. L. 52; see Abrams *v.* Foshee, 3 Iowa, 274; Hatfield *v.* Gano, 15 Iowa, 177; People *v.* Jackson, 3 Hill, 92; Wilson *v.* Iowa, 2 Ohio St. 319; Robbins *v.* State, 8 Ohio St. 131; State *v.* Smith, 32 Me. 369; Commonwealth *v.* Wood, 11 Gray, 85; Mills *v.* Commonwealth, 13 Pa. St. 631; State *v.* Morrow, 40 S. C. 221; Com. *v.* Thompson, 159 Mass. 56; Cave *v.* State, 33 Tex. Cr. Rep. 335; People *v.* McGonegal, 136 N. Y. 62. One who abets or assists in procuring an abortion is guilty of a crime. People *v.* Vanzile, 73 Hun, 534. So, also, is the unsuccessful attempt to commit an abortion a punishable crime. Com. *v.* Tibbetts, 157 Mass. 519. And see People *v.* McGonegal, *supra,* as to the effect of evidence, that the time was not sufficient for the successful commission of the crime of abortion.

[1]See *post,* § 44.

[2]In Montreal, Canada, during the winter of 1885-86, the enforcement of such a law was resisted by a large part of the population, and serious riots ended. It has been made optional in England by recent statute (1898).

[1]Bissell *v.* Davison, 65 Conn. 183; *In re* Walters, 84 Hun, 457; Duffield *v.* School Dist. of Williamsport, 162 Pa. St. 476; Abeel *v.* Clark, 84 Cal. 226. In Illinois it has been held that a school board cannot require vaccination as a condition precedent to the attendance of a child upon the public school, except where small-pox is epidemic in the place. People *v.* Board of Education, 177 Ill. 572.

[2]Morris *v.* City of Columbus, 102 Ga. 792.

[3]On the general question of the constitutionality of law, requiring all school children to be vaccinated, see Nissley *v.* School Directors, 18 Pa. Co. Ct. 481; 5 Pa. Dist. 732; Sprague *v.* Baldwin, 18 Pa. Co. Ct. 568; Duffield *v.* Williamsport School Dist., 162 Pa. St. 476; Bissell v. Davison, 65 Conn. 183; *In re* Rebenack, 62 Mo. App. 8; Morris *v.* City of Columbus (Ga. 99), 30 S. E. 850; Miller *v.* School Dist., 5 Wyo. 217. There must, of course, be an express statutory authority, in order to justify a board of health in forcing vaccination upon unwilling patients. State *v.* Burdge, 95 Wis. 390. And where compulsory vaccination is provided for in general terms, it can be enforced against school children only on the occasion of a small pox epidemic. A resolution of a school board, under such a law, denying the privileges of the school to children at other times, who do not produce a certificate of vaccination, is void and without authority. Potts v. Breen, 167 Ill. 67; 47 N. E. 81. But it is lawful, however, to require at all times such a certificate of vaccination when it is authorized by statute. Lawbaugh *v.* Board of Education, 66 Ill. App. 159.

[1]See *post,* § 145, for a more thorough discussion of nuisances.

[2]See *post,* § 154, in respect to the power of the State to compel the owner of land to remove natural causes of annoyance.

[3]Reeves *v.* Treasurer, 8 Ohio St. 333.

[4]Roberts *v.* Chicago, 26 Ill. 249. See Wilson *v.* New York, 1 Denio, 595; Mills *v.* Brooklyn, 32 N. Y. 489; Carr *v.* Northern Liberties, 35 Pa. St. 824; Detroit *v.* Michigan, 34 Mich. 125; Delphi *v.* Evans, 36 Ind. 90; Cotes *v.* Davenport, 9 Iowa, 227; Lamber *v.* St. Louis, 15 Mo. 610; White *v.* Yazoo, 27 Miss. 357.

[1]See Cooley on Torts, 616.

[2]Cooley on Torts, 596.

[1]Huckenstein's Appeal, 70 Pa. St. 102 (10 Am. Rep. 669).

[2]St. Helen's Smelting Co. *v.* Tipling, 11 H. L. Cas. 642; Whitney *v.* Bartholomew, 21 Conn. 213; McKeon *v.* Lee, 51 N. Y. 300 (10 Am. Rep. 659); Huckenstein's Appeal, 70 Pa. St. 102 (10 Am. Rep. 669); Gilbert *v.* Showerman, 23 Mich. 448; Kirkman *v.* Handy, 11 Humph. 406; Cooley on Torts, 596-605; 1 Dillon's Municipal

Corp., § 374, note. "If one lives in a city he must expect to suffer the dirt, smoke, noisome odors, noise and confusion incident to city life. As Lord Justice James beautifully said in Salvin *v.* North Brancepeth Coal Co., L. M. 9 Ch. Ap. 705, 'if some picturesque haven opens its arms to invite the commerce of the world, it is not for this court to forbid the embrace, although the fruit of it should be the sights and sounds and smells of a common seaport and shipbuilding town, which would drive the Dryads and their masters from their ancient solitude.' " Earl, J., in Campbell *v.* Seaman, 63 N. Y. 568.

[3]In this and succeeding sections, which relate to security to reputation, the law has remained unchanged, and, as the inclusion of this subject in the present volume may be considered as a reduction of it to an academic question, I have not attempted to collect the later cases which have involved these questions.

[1]"It properly signifies this and nothing more; that the excepted instances shall so far change the ordinary rule with respect to slanderous or libelous matter as to remove the regular and usual presumption of malice, and to make it incumbent on the party complaining to show malice." Daniel, J., in White *v.* Nichols, 3 How. 266, 287. See Lewis *v.* Chapman, 16 N. Y. 369.

[1]Cooley Const. Lim. 425.

[2]Pattison *v.* Jones, 8 B. & C. 578; Bradley *v.* Heath, 12 Pick. 163; Hatch *v.* Lane, 105 Mass. 394; Elam *v.* Badger, 23 Ill. 498; Noonan *v.* Orton, 32 Wis. 106. So also is a subsequent communication to one who had employed a clerk upon the former's recommendation, of the facts which have induced a change of opinion. Fowles *v.* Bowen, 30 N. Y. 20.

[3]Smith *v.* Thomas, 2 Bing. N. C. 372; White *v.* Nichols, 3 How. 266; Cooley on Torts, 216.

[4]Lewis *v.* Chapman, 16 N. Y. 369; Ormsby *v.* Douglass, 37 N. Y. 477.

[5]Taylor *v.* Church, 8 N. Y. 452; Sunderlin *v.* Bradstreet, 46 N. Y. 188 (7 Am. Rep. 322). See note 2, p. 55.

[1]Lewis *v.* Chapman, 16 N. Y. 369. See Todd *v.* Hawkins, 8 C. & P. 88; Cockagne *v.* Hodgkisson, 5 C. & P. 543; Klinck *v.* Colby, 46 N. Y. 274 (7 Am. Rep. 360); Joannes *v.* Bennett, 5 Allen, 170; Hatch *v.* Lane, 105 Mass. 394; Fitzgerald *v.* Robinson, 112 Mass. 371; State *v.* Burnham, 9 N. H. 34; Knowles *v.* Peck, 42 Conn. 386 (19 Am. Rep. 542); Goslin *v.* Cannon, 1 Harr. 3; Grimes *v.* Coyle, 6 B. Mon. 301; Rector *v.* Smith, 11 Iowa, 302.

[2]The provision in the United States constitution is, "And for any speech or debate in either house, they (the members of Congress) shall not be questioned in any other place." U. S. Const. art. I., § 6. It is believed that similar provisions are to be found in every State constitution having reference to members of State legislatures, except those of North Carolina, South Carolina, Mississippi, Texas, California and Nevada. Cooley Const. Lim. *446, note 1.

[1]Coffin *v.* Coffin, 4 Mass. 1, 27 (3 Am. Dec. 189). The constitutional provision, which was in force when this case arose, was as follows: "The freedom of deliberation, speech and debate in either house, cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatever."

[2]Coffin *v.* Coffin, 4 Mass. 1 (3 Am. Dec. 189); State *v.* Burnham, 9 N. H. 34; Perkins *v.* Mitchell, 31 Barb. 461.

[3]Cooley on Torts, 214.

[1]Kine *v.* Sewell, 3 Mees. & W. 297; Kidder *v.* Parkhurst, 3 Allen, 393; Worthington *v.* Scribner, 108 Mass. 487 (12 Am. Rep. 736); Eames *v.* Whittaker, 123 Mass. 342; Jarvis *v.* Hathaway, 3 Johns. 180; Allen *v.* Crofoot, 2 Wend. 515; Burlingame *v.* Burlingame, 8 Cow. 141; Garr *v.* Selden, 4 N. Y. 91; Maurice *v.* Worden, 54 Md. 233 (39 Am. Rep. 384); Vaussee *v.* Lee, 1 Hill (S. C.), 197 (26 Am. Dec. 168); Marshall *v.* Gunter, 6 Rich. 419; Lea *v.* Sneed, 4 Sneed, 111; Grimes *v.* Coyle, 6 B. Mon. 301; Bunton *v.* Worley, 4 Bibb, 38 (7 Am. Dec. 735); Strauss *v.* Meyer, 48 III. 385; Spaids *v.* Barrett, 57 III. 289; Wyatt *v.* Buell, 47 Cal. 624.

[2]Strauss *v.* Meyer, 48 III. 385; Lea *v.* White, 4 Sneed, 111; Forbes *v.* Johnson, 11 B. Mon. 48.

[1]McLaughlin *v.* Cowley, 127 Mass. 316; Davis *v.* McNees, 8 Humph. 40; Ruohs *v.* Packer, 6 Heisk. 395 (19 Am. Rep. 598); Wyatt *v.* Buell, 47 Cal. 624.

[2]Goslin *v.* Cannon, 1 Harr. 3.

[3]Klinck *v.* Colby, 46 N. Y. 427 (7 Am. Rep. 360).

[4]Rector *v.* Smith, 11 Iowa, 302.

[5]Dunlap *v.* Glidden, 31 Me. 435; Barnes *v.* McCrate, 32 Me. 442; Cunningham *v.* Brown, 18 Vt. 123; Allen *v.* Crofoot, 2 Wend. 515 (20 Am. Dec. 647); Garr *v.* Selden, 4 N. Y. 91; Marsh *v.* Ellsworth, 50 N. Y. 309; Grove *v.* Brandenburg, 7 Black f. 234; Shock *v.* McChesney, 4 Yeates, 507 (2 Am. Dec. 415); Terry *v.* Fellows, 21 La. Ann. 375; Smith *v.* Howard, 28 Iowa, 51.

[1]See Barnes *v.* McCrate, 32 Me. 442; Kidder *v.* Parkhurst, 3 Allen, 393; White *v.* Carroll, 42 N. Y. 166 (1 Am. Rep. 503); Calkins *v.* Sumner, 13 Wis. 193.

[2]Cooley on Torts, 214; Townshend on Slander and Libel, § 227.

[3]Dunham *v.* Powers, 42 Vt. 1; Rector *v.* Smith, 11 Iowa, 302.

[4]Hastings *v.* Lusk, 22 Wend. 410 (34 Am. Dec. 380); Warner *v.* Paine, 2 Sandf. 195; Marsh *v.* Ellsworth, 50 N. Y. 309; McMillan *v.* Birch, 1 Binney, 178 (2 Am. Dec. 426); McLaughlin *v.* Cowley, 127 Mass. 316; Harden *v.* Comstock, 2 A. K. Marsh. 480 (12 Am. Dec. 168); Spaids *v.* Barnett, 57 Ill. 289; Jennings *v.* Paine, 4 Wis. 358.

[1]Hoar *v.* Wood, 3 Metc. 193. See Bradley *v.* Heath, 12 Pick. 163; Mower *v.* Watson, 11 Vt. 536 (34 Am. Dec. 704); Gilbert *v.* People, 1 Denio, 41; Ring *v.* Wheeler, 7 Cow. 725; Hastings *v.* Lusk, 22 Wend. 410 (34 Am. Dec. 380); Stackpole *v.* Hennen, 6 Mart. (n. s.) 481 (17 Am. Dec. 187); Marshall *v.* Gunter, 6 Rich. 419; Lester *v.* Thurmond, 51 Ga. 118; Ruohs *v.* Backer, 6 Heisk. 395 (19 Am. Rep. 598); Lawson *v.* Hicks, 38 Ala. 279; Jennings *v.* Paine, 4 Wis. 358.

[1]Gathercole *v.* Miall, 15 Mees. & W. 319.

[1]Cooley Const. Lim. 440.

[1]But the retirement from public life during the present year (1886) of a prominent English statesman on account of his conviction of the act of adultery, would indicate that public sentiment is changing in this regard, and at no distant day will require that the private character of public men shall be as pure as their public character.

[1]Thorn *v.* Blanchard, 5 Johns. 508. In Howard *v.* Thompson, 21 Wend. 319, it was held in order that plaintiff may sustain his action in such a case, he must not only prove actual malice, but also show the want of probable cause, the action being considered by the court of the nature of an action for malicious prosecution. See, generally, in support of the privilege, Bodwell *v.* Osgood, 3 Pick. 379 (15 Am. Dec. 228); Bradley *v.* Heath, 12 Pick. 163; Hill *v.* Miles, 9 N. H. 9; State *v.* Burnham, 9 N. H. 34 (31 Am. Dec. 217); Howard *v.* Thompson, 12 Wend. 545; Gray *v.* Pentland, 2 Serg. & R. 23; Van Arnsdale *v.* Laverty, 69 Pa. St. 103; Harris *v.* Huntington, 2 Tyler, 129 (4 Am. Dec. 728); Reid *v.* DeLorme, 2 Brev. 76; Forbes *v.* Johnson, 11 B. Mon. 48; Whitney *v.* Allen, 62 Ill. 472; Larkin *v.* Noonan, 19 Wis. 82. In George Knapp & Co. *v.* Campbell (Tex. Civ. App.), 36 S. W. 765, it was held that the publication in a newspaper of false accusations against a candidate for an appointive Federal office, was not privileged.

[2]Vanderzee *v.* McGregory, 12 Wend. 545; Street *v.* Wood, 15 Barb. 105.

[3]Kershaw *v.* Bailey, 1 Exch. 743; Farnsworth *v.* Storrs, 5 Cush. 412; Remington *v.* Congdon, 2 Pick. 310; York *v.* Pease, 2 Gray, 282; Fairchild *v.* Adams, 11 Cush. 549; Shurtleff *v.* Stevens, 51 Vt. 501 (31 Am. Rep. 698); Haight *v.* Cornell, 15 Conn. 74; O'Donaghue *v.* McGovern, 23 Wend 26; Wyick *v.* Aspinwall, 17 N. Y. 190; Chapman *v.* Calder, 14 Pa. St. 365; McMillan *v.* Birch, 1 Binn. 178 (2 Am. Dec. 426); Reid *v.* DeLorne, 2 Brev. 76; Dunn *v.* Winters, 2 Humph. 512; Lucas *v.* Case, 9 Bush, 562; Dial *v.* Holter, 6 Ohio St. 228; Kleizer *v.* Symmes, 40 Ind. 562; Servatius *v.* Pichel, 34 Wis. 292.

[1]Streety *v.* Wood, 15 Barb. 105; Kirkpatrick *v.* Eagle Lodge, 26 Kan. 384. A report by officers of a corporation to a meeting of its stockholders falls under the same rule. Philadelphia, etc., R. R. Co. *v.* Quigley, 21 How. 202.

[2]Fairman *v.* Ives, 5 B. & Ald. 642; Woodward *v.* Lander, 6 L. & P. 548; State *v.* Burnham, 9 N. H. 34; Hosmer *v.* Loveland, 19 Barb. 111; Cook *v.* Hill, 3 Sandf. 341.

[3]Mayrant *v.* Richardson, 1 Nott & McCord, 348 (9 Am. Dec. 707); Commonwealth *v.* Clapp, 4 Mass. 163 (3 Am. Dec. 212); Commonwealth *v.* Morris, 1 Va. Cas. 175 (5 Am. Dec. 515); Sweeney *v.* Baker, 13 W. Va. 158 (31 Am. Rep. 757); Mott *v.* Dawson, 46 Iowa, 533. But see Robbins *v.* Treadway, 2 J. J. Marsh. 540 (19 Am. Dec. 152); Spiering *v.* Andree, 45 Wis. 330 (30 Am. Rep. 744).

[1]Lewis *v.* Few, 5 Johns. 1, 35.

[1]See King *v.* Root, 4 Wend. 113 (21 Am. Dec. 102); Powers *v.* Dubois, 17 Wend. 63; Hunt *v.* Bennett, 19 N. Y. 173; Hamilton *v.* Eno, 81 N. Y. 116; Thomas *v.* Crosswell, 7 Johns. 264 (5 Am. Dec. 269); Tillson *v.* Robbins, 68 Me. 295 (28 Am. Rep. 50); Hook *v.* Hackney, 16 Serg. & R. 385; Sweeney *v.* Baker, 13 W. Va. 158 (31 Am. Rep. 757); Foster *v.* Scripps, 39 Mich. 376 (33 Am. Rep. 403); Wilson *v.* Noonan, 35 Wis. 321; Gottbehuet *v.* Hubachek, 36 Wis. 515; Gove *v.* Bleehen, 21 Min. 80 (18 Am. Rep. 380), Rearick *v.* Wilcox, 81 Ill. 77; Russell *v.* Anthony, 21 Kan. 450 (30 Am. Rep. 436). See Barr *v.* Moore, 87 Pa. St. 385 (30 Am. Rep. 367).

[2]Hotchkiss *v.* Oliphant, 2 Hill, 510-513, per Nelson, Ch. J.

[1]Cooley Const. Lim. *454.

[1]See Commonwealth *v.* Nichols, 10 Met. 259; Mason *v.* Mason, 4 N. H. 110; Carpenter *v.* Bailey, 53 N. H. 590; Lewis *v.* Few, 5 Johns. 1; Andres *v.* Wells, 7 Johns. 260 (5 Am. Dec. 257); Dale *v.* Lyon, 10 Johns. 447 (6 Am. Dec. 346); Marten *v.* Van Shaik, 4 Paige, 479; Sandford *v.* Bennett, 24 N. Y. 20; Hampton *v.* Wilson, 4 Dev. 468; Parker *v.* McQueen, 8 B. Mon. 16; Fowler *v.* Chichester, 26 Ohio St. 9; Cates *v.* Kellogg, 9 Ind. 506; Farr *v.* Rasco, 9 Mich. 353; Wheeler *v.* Shields, 3 Ill. 348; Cummerford *v.* McAvoy, 15 Ill. 311; Hawkins *v.* Lumsden, 10 Wis. 359; Beardsley *v.* Bridgman, 17 Iowa, 290.

[2]"The law recognizes no such peculiar rights, privileges or claims to indulgence. They have no rights but such as are common to all. They have just the same rights that the rest of the community have, and no more. They have the right to publish the truth, but no right to publish falsehood to the injury of others with impunity." King *v.* Root, 4 Wend. 113 (21 Am. Dec. 102).

[1]Lewis *v.* Chapman, 16 N. Y. 369; Ormsby *v.* Douglass, 37 N. Y. 477.

[2]Thus, the reports of a mercantile agency, published and distributed among its subscribers, have been held not to be privileged. Giacona *v.* Bradstreet, 48 La. Ann. 1191; Taylor *v.* Church, 8 N. Y. 452; Sunderlin *v.* Bradstreet, 46 N. Y. 188 (7 Am. Rep. 322). It may be assumed that if any one, having an interest in knowing the credit and standing of the plaintiffs, or whom the defendants supposed and believed to have had such interest, had made the inquiry of the defendants, and the statement in the alleged libel had been made in answer to the inquiry in good faith; and upon information upon which the defendants relied, it would have been privileged. This was the case of Ormsby *v.* Douglass, 37 N. Y. 477. The business of the defendant in that case was of a similar character to that of the present defendants; and the statement

complained of was made orally, to one interested in the information, upon personal application at the office of the defendant who refused to make a written statement. There was no other publication, and it was held that the occasion justified the defendant in giving such information as he possessed to the applicant.

"In the case at bar, it is not pretended that but few, if any, of the persons to whom the 10,000 copies of the libelous publication were transmitted, had any interest in the character or pecuniary responsibility of the plaintiffs; and to those who had no such interest there was no just occasion or propriety in communicating the information. The defendants, in making the communication, assumed the legal responsibility which rests upon all who, without cause, publish defamatory matter of others, that is, of proving the truth of the publication, or responding in damages to the injured party. The communication of the libel, to those not interested in the information, was officious and unauthorized, and, therefore, not protected, although made in the belief of its truth, if it were in point of fact false." Judge Allen in Sunderlin *v.* Bradstreet, *supra.*

[1]State *v.* McCabe, 135 Mo. 450.

[2]Lewis *v.* Levy, E. B. & E. 537; Hoare *v.* Silverlock, 9 C. B. 20; Torrey *v.* Field, 10 Vt. 353; Stanley *v.* Webb, 4 Sandf. 21; Fawcett *v.* Charles, 13 Wend. 473; McBee *v.* Fulton, 47 Md. 403 (28 Am. Rep. 465); Cincinnati Gazette Co. *v.* Timberlake, 10 Ohio St. 548. The privilege is also extended to the publication of investigations ordered by Congress. Ferry *v.* Fellows, 21 La. Ann. 375.

[3]Saunders *v.* Baxter, 6 Heisk. 369.

[1]Stiles *v.* Nokes, 7 East, 493; Clark *v.* Binney, 2 Pick. 112; Commonwealth *v.* Blanding, 3 Pick. 304 (15 Am. Dec. 214); Pittock *v.* O'Neill, 63 Pa. St. 253 (3 Am. Rep. 544); Scripps *v.* Reilly, 38 Mich. 10; Storey *v.* Wallace, 60 Ill. 51.

[2]Saunders *v.* Mills, 6 Bing. 213; Flint *v.* Pike, 4 B. & C. 473. See Stanley *v.* Webb, 4 Sandf. 21.

[1]Stanley *v.* Webb, 4 Sandf. 21. See Usher *v.* Severance, 21 Me. 9 (37 Am. Dec. 33); Matthews *v.* Beach, 5 Sandf. 259; Cincinnati Gazette Co. *v.* Timberlake, 10 Ohio St. 548; Duncan *v.* Thwaites, 3 B. & C. 556; Charlton *v.* Watton, 6 C. & P. 385.

[2]Lewis *v.* Levy, E. B. & E. 537.

[1]Burrows *v.* Bell, 7 Gray, 301; Shurtleff *v.* Stevens, 51 Vt. 501 (31 Am. Rev. 698).

[2]Terry *v.* Fellows, 21 La. Ann. 375.

[1]Witham *v.* Gowen, 14 Me. 362; Payson *v.* Caswell, 22 Me. 212; Whitney *v.* Peckham, 15 Mass. 242; Bacon *v.* Towne, 4 Cush. 217; Kirkpatrick *v.* Kirkpatrick, 39 Pa. St. 288; Griffs *v.* Sellars, 4 Dev. & Bat. 176.

[2]Wheeler *v.* Nesbit, 24 How. (U. S.) 545. See Gee *v.* Patterson, 63 Me. 49; Barron *v.* Mason, 31 Vt. 189; Mowry *v.* Whipple, 8 R. I. 360; Stone *v.* Stevens, 12 Conn. 219; Carl *v.* Ayres, 53 N. Y. 13; Farnam *v.* Feeley, 55 N. Y. 551; Fagnan *v.* Knox, 65 N. Y. 525; Winebiddle *v.* Porterfield, 9 Pa. St. 137; Boyd *v.* Cross, 35 Md. 194; Spengle *v.* Davy, 15 Gratt. 381; Braveboy *v.* Cockfield, 2 McMul. 270; Raulston *v.* Jackson, 1 Sneed, 128; Faris *v.* Starke, 3 B. Mon. 4; Collins *v.* Hayte, 50 Ill. 353; Gallaway *v.* Burr, 32 Mich. 332; Lawrence *v.* Lanning, 4 Ind. 194; Shaul *v.* Brown, 28 Iowa, 57 (4 Am. Rep. 151); Bauer *v.* Clay, 8 Kan. 580.

[3]Williams *v.* Taylor, 6 Bing. 183; Cloon *v.* Gerry, 13 Gray, 201; Heyne *v.* Blair, 62 N. Y. 19; Travis *v.* Smith, 1 Pa. St. 234; Bell *v.* Pearcy, 5 Ired. 83; Hall *v.* Hawkins, 5 Humph. 357; Israel *v.* Brooks, 23 Ill. 575; King *v.* Ward, 77 Ill. 603; Mitchinson *v.* Cross, 58 Ill. 366; Callahan *v.* Caffarati, 39 Mo. 136; Sappington *v.* Watson, 50 Mo. 83; Malone *v.* Murphy, 2 Kan. 250.

[1]Merriam *v.* Mitchell, 13 Me. 439; Mowry *v.* Whipple, 8 R. I. 360; Closson *v.* Staples, 42 Vt. 209; Panghurn *v.* Bull, 1 Wend. 345; McKewn *v.* Hunter, 30 N. Y. 624; Dietz *v.* Langfitt, 63 Pa. St. 234; Cooper *v.* Utterbach, 37 Md. 282; Flickinger *v.* Wagner, 46 Md. 581; Ewing *v.* Sanford, 19 Ala. 605; Blass *v.* Gregor, 15 La. Ann. 421; White *v.* Tucker, 16 Ohio St. 468; Ammerman *v.* Crosby, 26 Ind. 451; Harpham *v.* Whitney, 77 Ill. 32; Holliday *v.* Sterling, 62 Mo. 321; Harkrader *v.* Moore, 44 Cal. 144.

[2]Campbell, J., in Stanton *v.* Hart, 27 Mich. 539.

[1]See Olmstead *v.* Partridge, 16 Gray, 383; Besson *v.* Southard, 10 N. Y. 237; Laughlin *v.* Clawson, 27 Pa. St. 330; Fisher *v.* Forrester, 33 Pa. St. 501; Ross *v.* Innis, 26 Ill. 259; Potter *v.* Sealey, 8 Cal. 217; Levy *v.* Brannan, 39 Cal. 485. Mr. Cooley, in his work on Torts, p. 183, says: "A prudent man is, therefore, expected to take such advice (of counsel), and when he does so, and places all the facts before his counsel, and acts upon his opinion, proof of the fact *makes out a case of probable cause,* provided the disclosure appears to have been full and fair, and not to have withheld any of the material facts."

[2]Snow *v.* Allen, 1 Stark. 409; Sommer *v.* Wilt, 4 Serg. & R. 20; Davenport *v.* Lynch, 6 Jones L. 545; Stanton *v.* Hart, 27 Mich. 539; Murphy *v.* Larson, 77 Ill. 172; Williams *v.* Van Meter, 8 Mo. 339; Center *v.* Spring, 2 Clarke, 393; Rover *v.* Webster, 3 Clarke, 502.

[3]See Soule *v.* Winslow, 66 Me. 447; Bartlett *v.* Brown, 6 R. I. 37; Ames *v.* Rathbun, 55 Barb. 194; Walter *v.* Sample, 25 Pa. St. 275; Turner *v.* Walker, 3 G. & J. 380; Gould *v.* Gardner, 8 La. Ann. 11; Phillips *v.* Bonham, 16 La. Ann. 387; Lemay *v.* Williams, 32 Ark. 166; Wood *v.* Weir, 5 B. Mon. 544; Wicker *v.* Hotchkiss, 62 Ill. 107; Davie v. Wisher, 72 Ill. 262; Wilkinson *v.* Arnold, 13 Ind. 45; Bliss *v.* Wyman, 7 Cal. 257. In the case of Blunt *v.* Little, 3 Mason, 102, Mr. Justice Story said: "It is certainly going a great way to admit the evidence of any counsel that he advised a suit upon a deliberate examination of the facts, for the purpose of *repelling the imputation of malice and establishing probable cause.* My opinion, however, is that such

evidence is admissible." So, also, in Walter *v.* Sample, 25 Pa. St. 275, we find the law stated thus: "Professors of the law are the proper advisers of men in doubtful circumstances, and their advice, when fairly obtained, exempts the party who acts upon it from the imputation of *proceeding maliciously* and without *probable cause*."

[1]Blunt *v.* Little, 3 Mason, 102.

[1]Burnap *v.* Albert, Taney, 344; Ames *v.* Rathbun, 55 Barb. 194; Kimoall *v.* Bates, 50 Me. 308; Brown *v.* Randall, 36 Conn. 56; Prough *v.* Entriken, 11 Pa. St. 81; Fisher *v.* Forrester, 33 Pa. St. 501; Schmidt *v.* Weidman, 63 Pa. St. 173; Davenport *v.* Lynch, 6 Jones L. 545; Glascock *v.* Bridges, 15 La. Ann. 672; King *v.* Ward, 77 III. 603; Rover *v.* Webster, 3 Clarke, 502; Chapman *v.* Dodd, 10 Minn. 350. In Snow *v.* Allen, 1 Stark. 409, one of the earliest cases in which the advice of counsel was set up as a defense, Lord Ellenborough inquired: "How can it be contended here that the defendant acted maliciously? He acted ignorantly. * * * He was acting under what he thought was good advice, it was unfortunate that his attorney was misled by Higgin's Case (Cro. Jac. 320); but unless you can show that the defendant was actuated by some purposed malice, the plaintiff can not recover." In Sharpe *v.* Johnstone (59 Mo. 577; *s. c.* 76 Mo. 660), Judge Hough said (76 Mo. 674): "Although defendants may have communicated to counsel learned in the law, all the facts and circumstances bearing upon the guilt or innocence of the plaintiff, which they knew or by any reasonable diligence could have ascertained, yet if, notwithstanding the advice of counsel, they believed that the prosecution would fail, and they were actuated in commencing said prosecution, not simply by angry passions or hostile feelings, but by a desire to injure and wrong the plaintiff, then most certainly they could not be said to have consulted counsel in good faith, and the jury would have been warranted in finding that the prosecution was malicious." See the annotation of the author to Sharpe *v.* Johnstone, in 21 Am. Law. Reg. (n. s.) 582

[1]U. S. Const. Amend., art. XIII. It has been held that this provision of the United States Constitution, *ipso facto* and instantaneously abolished any existing slavery in the territory of Alaska, when it came by purchase under the jurisdiction of the United States. *In re* Sah Quah, 31 Fed. 327.

[1]Webster's Works, vol. II., p. 393.

[1]Social Statics, p. 94. "Liberty as used in the provision of the fourteenth amendment to the Federal constitution, forbidding the States to deprive any person of life, liberty, or property without due process of law, includes, it seems, not merely the right of a person to be free from physical restraint, but to be free in the enjoyment of all his faculties in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to carry out the purposes above mentioned." Allgeyer *v.* State of Louisiana, 165 U. S. 578.

[2]Christiancy, J., in People *v.* Jackson & Mich. Plank Road Co., 9 Mich. 285.

[1]See *post,* ch. 12, 13, 14, and §§ 180-207.

[1]Lawton *v.* Steele, 119 N. Y. 226; *s. c.* 152 U. S. 133.

[2]See, also, to the same effect, Ford *v.* State, 85 Md. 465, in which it was held to be within the police power of a State to make the possession of a lottery outfit, or any part thereof, a misdemeanor.

[1]People *v.* Bosquet, 116 Cal. 75.

[2]Meadowcroft *v.* People, 163 Ill. 56.

[1]*Ex parte* King, 102 Ala. 182; State *v.* Yardley, 95 Tenn. 546; Hutchinson *v.* Davis, 58 Ill. App. 358. In the last case, this distinction between honest and dishonest failures to pay hotel bills is clearly set forth. See also State *v.* Norman, 110 N. C. 484, applying the same principle to the general cases of fraudulently contracted debts.

[2]State *v.* Wynne, 116 N. C. 981. So, also, where the court imprisons husband for refusing to pay alimony to his wife, under order of the court. Hurd *v.* Hurd (Minn.), 65 N. W. 728.

[3]State ex rel. Audibert *v.* Mauberret, 47 La. Ann. 334.

[1]Crosby *v.* City Council of Montgomery, 108 Ala. 498.

[2]Carr *v.* State, 106 Ala. 35.

[3]Drummer *v.* Nungesser, 107 Mich. 481.

[4]Light *v.* Canadian Co. Bank, 2 Okl. 543 (37 P. 1075).

[5]Cooley Const. Lim. *352, *353.

[1]Dartmouth College Case, 4 Wheat. 519; Webster's Works, vol. V., p. 487. For a full and exhaustive discussion and treatment of this constitutional limitation, see Cooley Const. Lim. *351-*413.

[2]U. S. Const., art. I., §§ 9, 10.

[1]Miller, J., in Ex parte Garland, 4 Wall. 333.

[1]Ex parte Garland, 4 Wall. 333; Drehman *v.* Stifle, 8 Wall. 595.

[2]See Cooley Const. Lim. *64, note.

[3]Cummings *v.* Missouri, 4 Wall. 277; *s. c.* State *v.* Cummings, 36 Mo. 263. The constitutional provision was likewise upheld in the following cases: State *v.* Garesche, 36 Mo. 256, in its application to an attorney; State *v.* Bernoudy, 36 Mo. 279, in the case of the recorder of St. Louis. In State *v.* Adams, 44 Mo. 570, after the Cummings case had been decided by the Supreme Court of the United States against the State, and after also a change in the *personnel* of the State court, a legislative act, which

declared the Board of Curators of St. Charles College deprived of their office, for failure to take the oath of loyalty, was held to be void as being a bill of attainder. A statute of this kind was likewise passed by the legislature of West Virginia, and although sustained at first by the Supreme Court of the State (Beirne *v.* Brown, 4 W. Va. 72; Pierce *v.* Karskadon, 4 W. Va. 234), it was subsequently held by the Supreme Court of the State, and of the United States, that the act was unconstitutional. Kyle *v.* Jenkins, 6 W. Va. 371; Lynch *v.* Hoffman, 7 W. Va. 553; Pearce *v.* Karskadon, 16 Wall. 234.

[1]People *v.* Hawker, 14 App. Div. 188; 43 N. Y. S. 516.

[2]U. S. Const., art. I., §§ 9 and 10.

[3]Calder *v.* Bull, 3 Dall. 386, 390.

[1]See Fletcher *v.* Peck, 6 Cranch, 87; Ogden *v.* Saunders, 12 Wheat. 213; Satterlee *v.* Matthewson, 2 Pet. 380; Watson *v.* Mercer, 8 Pet. 88; Charles River Bridge *v.* Warren Bridge, 11 Pet. 420; Carpenter *v.* Pennsylvania, 17 How. 456; Hopt *v.* Utah, 110 U. S. 574; Lock *v.* Dane, 9 Mass. 360; Woart *v.* Winnick, 3 N. H. 473; Dash *v.* Van Kleek, 7 Johns. 477; Moore *v.* State, 43 N. J. 203; Perry's Case, 3 Gratt. 632; Evans *v.* Montgomery, 4 Watts & S. 218; Huber *v.* Reilly, 53 Pa. St. 115. See In re Jaehne, 35 Fed. 357; People *v.* O'Neill, 109 N. Y. 251, in which it was held that the Penal Code, N. Y., § 72, was not *ex post facto,* for the reason that this provision, from the effect given to it by § 2143 of the consolidation act of New York City, impliedly repeals § 58 of the consolidation act, which latter section prescribed a less punishment for the same offense. In Lovett *v.* State, 33 Fla. 389, a statute changing the degrees of homicide could not be made to apply to offenses already committed when the statute became a law. But a retrospective law will be *ex post facto,* notwithstanding it does not provide for a criminal prosecution. The exaction of any penalty for the doing of an act, which before the law was altogether lawful, makes the law *ex post facto.* Falconer *v.* Campbell, 2 McLean, 195; Wilson *v.* Ohio, etc., R. R. Co., 64 Ill. 542. A statute has also been held to be *ex post facto,* which makes it a misdemeanor for one to practice medicine who has been convicted of a felony, so far as the statute is made to apply to persons who were convicted prior to its enactment. People *v.* Hawker, 14 App. Div. 188; 43 N. Y. S. 516.

[1]Woart *v.* Winnick, 3 N. H. 179; State *v.* Arlin, 39 N. H. 179; Hartung *v.* People, 22 N. Y. 95, 105; Shepherd *v.* People, 25 N. Y. 124; State *v.* Williams, 2 Rich. 418; Boston *v.* Cummings, 16 Ga. 102; Strong *v.* State, 1 Blackf. 193; Clarke *v.* State, 23 Miss. 261; Maul *v.* State, 25 Tex. 166; Turner *v.* State, 40 Ala. 21. It has thus been held that a law is not *ex post facto,* which repeals or changes the minimum punishment, if the maximum punishment remains unchanged. People *v.* Hayes, 140 N. Y. 484; Commonwealth *v.* Brown, 167 Mass. 144. So, also, an act of Congress, which extended the time for the registration of Chinese laborers, was held not to be *ex post facto,* because it excepted from its provisions those who had been theretofore convicted of felony. United States *v.* Chew Cheong, 61 Fed. 200.

[2]See State *v.* Arlin, 39 N. H. 179; State *v.* Williams, 2 Rich. 418; Strong *v.* State, 1 Blackf. 193; Herber *v.* State, 7 Tex. 69.

[3]Davies, J., in Ratzky *v.* People, 29 N. Y. 124. See Shepherd *v.* People, 25 N. Y. 406. "In my opinion," says Denio, J., in Hartung *v.* People, 22 N. Y. 95, 105, "it would be perfectly competent for the legislature, by a general law, to remit any separable portion of the prescribed punishment. For instance, if the punishment were fine and imprisonment, a law which should dispense with either the fine or the imprisonment might, I think, be lawfully applied to existing offenses; and so, in my opinion, the term of imprisonment might be reduced, or the number of stripes diminished, in cases punishable in that manner. Anything which, if applied to an individual sentence, would fairly fall within the idea of a remission of a part of the sentence, would not be liable to objection. And any change which should be referable to prison discipline or penal administration, as its primary object, might also be made to take effect upon past as well as future offenses; as changes in the manner or kind of employment of convicts sentenced to hard labor, the system of supervision, the means of restraint, or the like. Changes of this sort might operate to increase or mitigate the severity of the punishment of the convict, but would not raise any question under the constitutional provision we are considering. The change wrought by the act of 1860, in the punishment of the existing offenses of murder, does not fall within either of these exceptions. It is to be construed to vest in the governor a discretion to determine whether the convict should be executed or remain a perpetual prisoner at hard labor, this would only be equivalent to what he might do under the authority to commute a sentence. But he can, under the constitution, only do this once for all. If he refuses the pardon, the convict is executed according to the sentence. If he grants it, his jurisdiction of the case ends. The act in question places the convict at the mercy of the governor in office at the expiration of one year from the time of the conviction, and of all of his successors during the lifetime of the convict. He may be ordered to execution at any time, upon any notice, or without notice. Under one of the repealed sections of the Revised Statutes, it was required that a period should intervene between the sentence and the execution of not less than four, no more than eight weeks. If we stop here, the change effected by the statute is between an execution within a limited time, to be prescribed by the court, or a pardon or commutation during that period, on the one hand, and the placing the convict at the mercy of the executive magistrate for the time, and his successors, to be executed at his pleasure at any time after one year, on the other. The sword is indefinitely suspended over his head, ready to fall at any time. It is not enough to say, if ever that can be said, that most persons would probably prefer such a fate to the former capital sentence. It is enough to bring the law within the condemnation of the constitution, that it changes the punishment after the commission of the offense, by substituting for the prescribed penalty a different one. We have no means of saying whether one or the other would be the most severe in a given case. That would depend upon the disposition and temperament of the convict. The legislature can not thus experiment upon the criminal law. The law, moreover, prescribes one year's imprisonment, at hard labor in the State prison, in addition to the punishment of death. In every case of the execution of a capital sentence, it must be preceded by the year's imprisonment at hard labor. * * * It is enough, in my opinion, that it changes it (the punishment) in any manner, except by dispensing with divisible portions of it; but upon the other definition announced by

Judge Chase, where it is implied that the change must be from a less to a greater punishment, this act cannot be sustained."

[1]Gut *v.* State, 9 Wall. 35; State *v.* Learned, 47 Me. 426; State *v.* Corson, 59 Me. 137; Commonwealth *v.* Hall, 97 Mass. 570; Commonwealth *v.* Dorsey, 103 Mass. 412; State *v.* Wilson, 48 N. H. 398; Walter *v.* People, 32 N. Y. 147; Stokes *v.* People, 53 N. Y. 164; Warren *v.* Commonwealth, 37 Pa. St. 45; Rand *v.* Commonwealth, 9 Gratt. 738; State *v.* Williams, 2 Rich. 418; Jones *v.* State, 1 Ga. 610; Hart *v.* State, 40 Ala. 32; State *v.* Manning, 14 Tex. 402; Dowling *v.* Mississippi, 13 Miss. 664; Walton *v.* Commonwealth, 16 B. Mon. 15; Lasure *v.* State, 10 Ohio St. 43; McLaughlin *v.* State, 45 Ind. 338; Brown *v.* People, 29 Mich. 232; People *v.* Olmstead, 30 Mich. 431; Sullivan *v.* Oneida, 61 Ill. 242; State *v.* Ryan, 13 Minn. 370; State *v.* O'Flaherty, 7 Nev. 153. In State *v.* Tatlow (Mo.), 38 S. W. 552, an act relating to the change of venue was held to be applicable to crimes committed prior to the enactment of the law. So, likewise, it is not *ex post facto,* to apply to existing offenses a law, enacted subsequently, which shortens the time for making challenges. State *v.* Duestrow, 137 Mo. 44. In State *v.* Bates (Utah), 47 P. 78, and State *v.* Covington (Utah), 50 P. 526, a similar conclusion was reached, where, a constitutional provision, reducing the number of jurors in criminal prosecutions to less than twelve, was made to apply to the trial for a crime which had been committed before the constitutional provision took effect.

And the Supreme Court of the United States has held that a constitutional amendment, which confers criminal jurisdiction upon a division of the Supreme Court of a State, less in numbers and different in personnel, from the court as it was organized when the crime was committed, does not come within the definition of *ex post facto* laws (Duncan *v.* State, 152 U. S. 377). So, also, it is not *ex post facto* to apply to a crime, previously committed, a constitutional change in the qualification of the jurors; particularly, where the crime was committed after the adoption of the constitutional provision, and before the legislature had passed laws to carry the constitutional provision into effect. Gibson *v.* State of Mississippi, 162 U. S. 565; Hopt *v.* Utah, 110 U. S. 574.

[1]Thus, it was held that, where a State statute provided for the reward of good behavior of the convict by an annual reduction of the term of confinement, this privilege became a vested right, which could not be taken away or abridged by subsequent legislation. In re Canfield, 98 Mich. 644.

[2]In re Miller, 110 Mich. 676.

[3]Blackburn *v.* State, 50 Ohio St. 428; Commonwealth *v.* Graves, 155 Mass. 163; Sturtevant *v.* Commonwealth, 158 Mass. 598.

[4]§§ 11, 12a.

[1]Harper *v.* Commonwealth, 93 Ky. 290.

[2]State *v.* Reid, 106 N. C. 714; Ex parte Mitchell, 70 Cal. 1; State *v.* White, 44 Kan. 514; People *v.* Morris, 80 Mich. 634.

[3]State *v.* Becker, 3 S. D. 29.

[4]State *v.* De Lano, 80 Wis. 259.

[1]People *v.* Perini, 94 Cal. 573.

[2]In re Clark, 65 Conn. 17.

[1]In re Petrie, 1 Kan. App. 184 (40 P. 118).

[2]United States *v.* Hamilton, 3 Dall. 17; State *v.* Rockafellow, 6 N. J. 332; Com. *v.* Semmes, 11 Leigh, 665; State *v.* Summons, 19 Ohio, 139; Allery *v.* Com., 8 B. Mon. 3; Moore *v.* State, 36 Miss. 137; Foley *v.* People, 1 Ill. 31; Shore *v.* State, 6 Mo. 640; People *v.* Smith, 1 Cal. 9.

[1]See Commonwealth *v.* Brickett, 8 Pick. 138; Parker *v.* Bidwell, 3 Conn. 84; Reed *v.* Case, 4 Conn. 166 (10 Am. Dec. 110); Niccolls *v.* Ingersoll, 7 Johns. 145; Harp v. Osgood, 2 Hill, 216.

[2]McKane *v.* Durston, 153 U. S. 684.

[3]Foster *v.* Strayer (Com. Pl.), 6 Pa. Dist. Rep. 333; 27 Pittsb. Leg. J. (n. s.) 390.

[1]Cooley on Torts, 172, 173, 460. See State *v.* McNally, 34 Me. 210; State *v.* Weed, 21 N. H. 262; Underwood *v.* Robinson, 106 Mass. 296; Neth *v.* Crofut, 30 Conn. 580; Warner *v.* Shed, 10 Johns. 138; Brainard *v.* Head, 15 La. Ann. 489. See, also, generally, as to what process is fair on its face: Erskine *v.* Hohnbach, 14 Wall. 613; Watson *v.* Watson, 9 Conn. 140; Tremont *v.* Clarke, 33 Me. 482; Colman *v.* Anderson, 10 Mass. 105; Howard *v.* Proctor, 7 Gray, 128; Williamston *v.* Willis, 15 Gray, 427; Rice *v.* Wadsworth, 27 N. H. 104; Sheldon *v.* Van Buskirk, 2 N. Y. 473; Alexander *v.* Hoyt, 7 Wend. 89; Webber *v.* Gay, 24 Wend. 485; Chegaray *v.* Jenkins, 5 N. Y. 376; Moore *v.* Alleghany City, 18 Pa. St. 55; Billings *v.* Russell, 23 Pa. St. 189; Cunningham *v.* Mitchell, 67 Pa. St. 78; State *v.* Jervey, 4 Strob. 304; State *v.* Lutz, 65 N. C. 503; Gore *v.* Martin, 66 N. C. 371; Bird *v.* Perkins, 33 Mich. 28; Loomis *v.* Spencer, 1 Ohio St. 153; Noland *v.* Busby, 28 Ind. 154; Lott *v.* Hubbard, 44 Ala. 593; Brother *v.* Cannon, 2 Ill. 200; Shaw *v.* Dennis, 10 Ill. 405; McLean *v.* Cook, 23 Wis. 364; Orr *v.* Box, 22 Minn. 485; Turner *v.* Franklin, 29 Mo. 285; State *v.* Duelle, 48 Mo. 282; Walden *v.* Dudley, 49 Mo. 419. The officer cannot receive the warrant signed in blank by the judge or magistrate, and fill up the blanks himself. Such a warrant would be void. Pierce *v.* Hubbard, 10 Johns. 405; People *v.* Smith, 20 Johns. 63; Rafferty *v.* People, 69 Ill. 111; *s. c.* 72 Ill. 37 (18 Am. Rep. 601).

[1]Cooley on Torts, pp. 173, 464.

[2]In re Mahon, 34 Fed. 525.

[1]Grumon *v.* Raymond, 1 Conn. 39; Lewis *v.* Avery, 8 Vt. 287; Clayton *v.* Scott, 45 Vt. 386. But where the matter of jurisdiction is a question of fact and not a question of law, upon which the court issuing the warrant has pronounced judgment, the officer is protected by the warrant, and is not responsible for any error of the court. Clarke *v.* May, 2 Gray, 410; Mather *v.* Hood, 8 Johns. 447; Sheldon *v.* Wright, 5 N. Y. 497; State *v.* Scott, 1 Bailey, 294; Wall *v.* Trumbull, 16 Mich. 228.

[2]Barnes *v.* Barber, 6 Ill. 401; Guyer *v.* Andrews, 11 Ill. 494; Leachman *v.* Dougherty, 81 Ill. 324; Sprague *v.* Birchard, 1 Wis. 457, 464; Grace *v.* Mitchell, 31 Wis. 533, 539.

[3]Wilmarth *v.* Burt, 7 Met. 257; Twitchell *v.* Shaw, 10 Cush. 46; Grumon *v.* Raymond, 1 Conn. 40; Watson *v.* Watson, 9 Conn. 140, 146; Webber *v.* Gay, 24 Wend. 485; Cunningham *v.* Mitchell, 67 Pa. St. 78; Wall *v.* Trumbull, 16 Mich. 228; Bird *v.* Perkins, 33 Mich. 28; Brainard *v.* Head, 15 La. Ann. 489; Richards *v.* Nye, 5 Ore. 382. But he may, if he chooses, refuse to serve such a warrant, and waive the protection which he may claim from its being fair on its face. Horton *v.* Hendershot, 1 Hill, 118; Cornell *v.* Barnes, 7 Hill, 35; Dunlap *v.* Hunting, 2 Denio, 643; Earl *v.* Camp, 16 Wend. 562. See Davis *v.* Wilson, 61 Ill. 527; Hill *v.* Wait, 5 Vt. 124.

[1]Ruloff *v.* People, 45 N. Y. 213; Keenan *v.* State, 8 Wis. 132. But see Somerville *v.* Richards, 37 Mich. 299.

[2]But the belief must be a reasonable one. If the facts within his knowledge do not warrant his belief in the guilt of the innocent person whom he has arrested, he will be liable in an action for false imprisonment. State *v.* Holmes, 48 N. H. 377; Holly *v.* Mix, 3 Wend. 350; Reuck *v.* McGregor, 32 N. J. 70; Commonwealth *v.* Deacon, 8 Serg. & R. 47; State *v.* Roane, 2 Dev. 58; Long *v.* State, 12 Ga. 233; Eames *v.* State, 6 Humph. 53. Less particularity, in respect to the reasonableness of the suspicions against an individual, is required of an officer who makes an arrest without warrant, than of a private person. The suspicions must be altogether groundless, in order to make the officer liable for the wrongful arrest. See Marsh *v.* Loader, 14 C. B. (n. s.) 535; Lawrence *v.* Hedger, 3 Taunt. 14; Rohan *v.* Sawin, 5 Cush. 281; Holley *v.* Mix, 3 Wend. 350; Burns *v.* Erben, 40 N. Y. 463; Dreunan *v.* People, 10 Mich. 169.

[3]Philips *v.* Trull, 11 Johns. 477; Respublica *v.* Montgomery, 1 Yeates, 419; City Council *v.* Payne, 2 Nott & McCord, 475; Vandeveer *v.* Mattocks, 3 Ind. 479.

[4]See Mitchell *v.* Lemon, 34 Md. 176, in which it was held that one may be arrested without a warrant, who was found violating the rules laid down by the city board of health for the preservation of the public health. In Burroughs *v.* Eastman, 101 Mich. 419, it was held that an ordinance did not contravene the constitutional requirement of "due process of law," which authorized police officers to arrest without warrant persons who were violating any of the ordinances in their presence, even in those cases in which the offense committed did not amount to a breach of the peace. But see *contra,* State *v.* Hunter, 106 N. C. 796.

[1]People *v.* Moore, 62 Mich. 496.

[1]Winchell *v.* State, 7 Cow. 525; Maurer *v.* People, 43 N. Y. 1; Jacobs *v.* Cone, 5 Serg. & R. 335; State *v.* Alman, 64 N. C. 364; Andrews *v.* State, 2 Sneed, 550; Jackson *v.* Commonwealth, 19 Gratt. 656. In capital cases, the record must show affirmatively that the accused was present throughout the trial, and particularly when the verdict is brought in and sentence pronounced. Dougherty *v.* Commonwealth, 69 Pa. St. 286. But it seems that the accused need not always be personally present at the trial for misdemeanors. Cooley Const. Lim. 390.

[1]See Ex parte Caplis, 58 Miss. 358, and State *v.* Hodgson, 66 Vt. 134. In the latter case it would seem that a law, which took away or materially reduced the discretion of the court in granting continuances or entering a *nolle prosequi,* would be unconstitutional. The provisions of the statute in question were designed to prevent continuances for the purpose of delay, and to insure a speedy trial; but the court held that they did not invade the province of the court.

[2]Cooley Const. Lim. 311, 312.

[1]While I am writing, an account of a most flagrant case of official disrespect of private rights of this character has come to my ears. In my neighborhood a man has been allowed to linger in jail on the charge of burglary, for many days, awaiting his preliminary examination, because the prosecuting attorney was in attendance upon political picnics.

[1]The writer remembers how, on one occasion, while he was a student of the law at the University of Gottingen, he was bidden to leave the criminal court, because the case about to be tried was one involving deep moral turpitude. This has now become a rather common practice in this country; especially in large cities like New York, in order to exclude minors and women, who are drawn thither by a prurient curiosity.

[1]In 1836, by Stat. 6 and 7 Will. IV., ch. 114. Before this date, English jurists indulged in the pleasing fiction that the judge will be counsel for the prisoner. “It has been truly said that, in criminal cases, judges were counsel for the prisoners. So, undoubtedly, they were, as far as they could be, to prevent undue prejudice, to guard against improper influence being excited against prisoners; but it was impossible for them to go further than this, for they could not suggest the course of defense prisoners ought to pursue; for judges only saw the deposition so short a time before the accused appeared at the bar of their country, that it was quite impossible for them to act fully in that capacity.” Baron Garrow in a charge to a grand jury, quoted in Cooley Const. Lim. *332, n. 2.

[1]Wayne Co. *v.* Waller, 60 Pa. St. 99 (35 Am. Rep. 636); Bacon *v.* Wayne Co., 1 Mich. 461; Vise *v.* Hamilton Co., 19 Ill. 18.

[1]Commonwealth *v.* Taylor, 5 Cush. 605; Commonwealth *v.* Curtis, 97 Mass. 574; Commonwealth *v.* Sturtivant, 117 Mass. 122; Commonwealth *v.* Mitchell, 117 Mass. 431; People *v.* Phillips, 42 N. Y. 200; People *v.* McMahon, 15 N. Y. 385; State *v.* Guild, 10 N. J. 163 (18 Am. Dec. 404); Commonwealth *v.* Harman, 4 Pa. St. 269; State *v.* Bostick, 4 Harr. 563; Thompson *v.* Commonwealth, 20 Gratt. 724; State *v.*

Roberts, 1 Dev. 259; State *v.* Lowhorne, 66 N. C. 538; State *v.* Vaigneur, 5 Rich. 391; Frain *v.* State, 40 Ga. 529; State *v.* Garvey, 28 La. Ann. 955 (26 Am. Rep. 123); Boyd *v.* State, 2 Humph. 655; Morehead *v.* State, 9 Humph. 635; Austine *v.* State, 51 Ill. 236; State *v.* Brockman, 46 Mo. 566; State *v.* Staley, 14 Minn. 105.

[2]In some of the States all accusations are now made by information filed by the prosecuting attorney, and probably in all of the States prosecutions for minor misdemeanors are begun by information.

[3]Kallock *v.* Superior Court, 56 Cal, 229. State *v.* Sureties of Krohne (Wyo.), 34 P. 3; In re Boulter (Wyo.), 40 P. 520; State *v.* Bates (Utah), 47 P. 78; State *v.* Carrington (Utah), 50 P. 526; Hurtado *v.* People of California, 110 U. S. 516; McNulty *v.* People of California, 149 U. S. 645; Vincent *v.* People of California, 149 U. S. 648. But the United States Constitution requires indictment by grand jury in those cases in which it was required at common law. See United States Const., Amend., art. V.; Eilenbecker *v.* Dist. Court, 134 U. S. 31.

[4]In re Krug, 79 Fed. 308.

[1]Which was as follows: “That the prisoner be remanded to the prison from whence he came; and put into a low dark chamber; and there be laid on his back, on the bare floor, naked, unless where decency forbids; that there be placed upon his body, as great a weight of iron as he could bear, and more; that he have no sustenance, save only, on the first day three morsels of the worst bread; and, on the second day, three draughts of standing water, that should be nearest to the prison door; and in this situation such should be alternately his daily diet till he died, or (as anciently the judgment ran) till he answered.” 4 Bl. Com. 423.

[1]In Stringfellow *v.* State, 26 Miss. 155, a confession of murder was held not sufficient to warrant conviction, unless supported by other evidence showing the death of the man supposed to have been murdered. See, also, People *v.* Hennesy, 15 Wend. 147.

[2]Jackson *v.* Commonwealth, 19 Gratt. 656; Johns *v.* State, 55 Md. 350; State *v.* Thomas, 64 N. C. 74; Bell *v.* State, 2 Tex. App. 216 (28 Am. Rep. 429); Goodman *v.* State, Meigs, 197. But if there has been a preliminary examination before a coroner or magistrate, or a previous trial, when the defendant had an opportunity to cross-examine the witness, it will be allowable to make use of the minutes of the previous examination in all cases where the witness is since deceased, has become insane, or is sick, or is kept away by the defendant. Commonwealth *v.* Richards, 18 Pick. 434; State *v.* Hooker, 17 Vt. 658; Brown *v.* Commonwealth, 73 Pa. St. 321; Summons *v.* State, 5 Ohio St. 325; O’Brien *v.* Commonwealth, 6 Bush, 503; Pope *v.* State, 22 Ark. 371; Davis *v.* State, 17 Ala. 354; Kendricks *v.* State, 10 Humph. 479; People *v.* Murphy, 45 Cal. 137.

[1]State *v.* Beach, 147 Ind. 74; State *v.* Anderson, 5 Wash. St. 350 (31 P. 969); Floeck *v.* State (Tex. Cr. App.), 30 S. W. 794; Wooten *v.* State, 23 Fla. 335; People *v.* Cannon, 139 N. Y. 32; People *v.* Quinn, *Ib.;* People *v.* Bartholf, *Ib.*

[2]See Commonwealth *v.* Bonner, 97 Mass. 587; Commonwealth *v.* Morgan, 107 Mass. 109; Commonwealth *v.* Nichols, 114 Mass. 285 (19 Am. Rep. 346); Commonwealth *v.* Scott, 123 Mass. 239 (25 Am. Rep. 87); State *v.* Cameron, 40 Vt. 555; Brandon *v.* People, 42 N. Y. 265; Connors *v.* People, 50 N. Y. 240; Stover *v.* People, 56 N. Y. 315; Devries *v.* Phillips, 63 N. C. 53; Bird *v.* State, 50 Ga. 585; Calkins *v.* State, 18 Ohio St. 366; Knowles *v.* People, 15 Mich. 408; People *v.* Tyler, 36 Cal. 522. See, *contra,* State *v.* Bartlett, 55 Me. 200; State *v.* Lawrence, 57 Me. 375; State *v.* Cleaves, 59 Me. 298 (8 Am. Rep. 422).

[1]State *v.* Ober, 52 N. H. 459 (13 Am. Rep. 88); State *v.* Wentworth, 65 Me. 234 (20 Am. Rep. 688; Connors *v.* People, 50 N. Y. 240.

[2]In re Roberts (Kan. App.), 45 P. 942.

[3]Howland *v.* State, 58 N. J. L. 18.

[4]State *v.* Craig, 80 Me. 85; State *v.* Pugsley, 75 Iowa, 742; City of Creston *v.* Nye, 74 Iowa, 369; Grand Rapids & I. Ry. Co. *v.* Sparrow, 36 F. 210; Jester *v.* State, 26 Tex. App. 369; Conners *v.* Burlington, etc., Ry. Co., 74 Iowa, 383; Thomas *v.* Hilton (Wash.), 17 P. 882; State *v.* Cottrill, 31 W. Va. 162.

[1]What are the common-law characteristics of a jury trial, are so fully set forth and explained in books of criminal procedure, that any statement of them in this connection is unnecessary. State *v.* Churchill, 48 Ark. 426. It is not a violation of the constitutional guaranty of a trial by jury, if in the enforcement of city ordinances, juries are not required. State *v.* City of Topeka, 36 Kan. 76; Wong *v.* City of Astoria, 13 Oreg. 538. So, also, in enforcing the subpoenas of the United States Interstate Commission. Interstate Commerce Commission *v.* Brimson, 154 U. S. 447.

It is also held to be no violation of this constitutional provision for the statutes to authorize the defendants in criminal cases, and both parties in civil suits, to waive a jury, and try the case before a judge alone. Laverty *v.* State, 109 Ind. 217; Warwick *v.* State, 47 Ark. 568; Moore *v.* State, 21 Tex. App. 666; Citizens Gaslight Co. *v.* Wakefield, 161 Mass. 432.

It seems that where the offense is of grave import a statute is unconstitutional, which does not provide for a trial by jury; as, for example, where property of large or substantial value is directed to be condemned or destroyed, because it was used in violation of law. This ruling was made in a case under the fishery law of New York, which provided that vessels, unlawfully used in disturbing oyster beds, shall be seized, and condemned to be sold in proceedings before a justice of the peace, with out the intervention of a jury. This law was held to be a violation of the constitutional guaranty of trial by jury. Colon *v.* Lisk, 153 N. Y. 188; aff'g *s. c.* 43 N. Y. S. 364. On the other hand, under the same law, the summary destruction of fishing nets by a constable or peace officer, when found on or near the shores of the waters, was held to be constitutional, even though there has been no judicial condemnation of these contraband articles, with or without a jury. Lawton *v.* Steele, 119 N. Y. 226; *s. c.* 152 U. S. 133.

The common law permitted courts to commit persons for contempt of court, without the verdict of a jury; and it has been held that the legislature has no right to curtail the power of the courts to punish summarily for contempt. Hale *v.* State, 55 Ohio St. 210; In re McAdam, 54 Hun, 637.

[1]State *v.* Bates (Utah), 47 P. 78; State *v.* Thompson (Utah), 50 P. 409; State *v.* Carrington (Utah), 50 P. 526; Fant *v.* Buchanan (Miss.), 17 So. 371. But see *contra,* as to grand juries, State *v.* Hartley (Nev.), 40 P. 372.

[2]Spies *v.* People, 122 Ill. 1; People *v.* Ah Lee Doon, 97 Cal. 171.

[3]Lommen *v.* Minneapolis Gaslight Co., 65 Minn. 196.

[4]State *v.* Joseph, 45 La. Ann. 903. This case was one of alleged discrimination against the colored race in the trial of a colored person. It was held that the mere absence of negroes from the general venire did not prove unconstitutional discrimination, where it was not shown that the names of negroes were excluded from the general venire box, from which the venire was drawn.

[1]Commonwealth *v.* Tuck, 20 Pick. 365; People *v.* Barrett, 2 Caines, 304; State *v.* Alman, 64 N. C. 364; Nolan *v.* State, 55 Ga. 521; Grogan *v.* State, 44 Ala. 9; State *v.* Connor, 5 Cold. 311; Mounts *v.* State, 14 Ohio, 295; Baker *v.* State, 12 Ohio St. 214; State *v.* Callendine, 8 Iowa, 288. But see State *v.* Champeau, 53 Vt. 313 (36 Am. Rep. 754), in which a *nolle prosequi* at this stage is held not to constitute a bar to a second prosecution. See, generally, as to what constitutes a legal jeopardy: State *v.* Garvey, 42 Conn. 232; People *v.* McGowan, 17 Wend. 386; Commonwealth *v.* Alderman, 4 Mass. 477; State *v.* Little, 1 N. H. 257; Williams *v.* Commonwealth, 2 Gratt. 568; Hoffman *v.* State, 20 Md. 475; State *v.* Spier, 1 Dev. 491; McFadden *v.* Commonwealth, 23 Pa. St. 12; State *v.* Ned, 7 Port. 217; Lee *v.* State, 26 Ark. 260 (7 Am. Rep. 611); O'Brian *v.* Commonwealth, 9 Bush, 333 (15 Am. Rep. 715); Price *v.* State, 19 Ohio, 423; Wright *v.* State, 5 Ind. 292; State *v.* Nelson, 26 Ind. 366; People *v.* Cook, 10 Mich. 164; State *v.* Green, 16 Iowa, 239; People *v.* Webb, 28 Cal. 467; State *v.* Richardson, 47 S. C. 166. A civil suit after criminal prosecution does not constitute a second jeopardy in the constitutional sense. State *v.* Roby, 142 Ind. 168.

[2]Commonwealth *v.* Bakeman, 105 Mass. 53; Black *v.* State, 36 Ga. 447; Kohlheimer *v.* State, 39 Miss. 548; Mount *v.* Commonwealth, 2 Duv. 93; Gerard *v.* People, 4 Ill. 363; Commonwealth *v.* Goddard, 13 Mass. 455; People *v.* Tyler, 7 Mich. 161.

[1]See United States *v.* Perez, 9 Wheat. 579; Commonwealth *v.* Boden, 9 Mass. 194; Hoffman *v.* State, 20 Md. 425; State *v.* Wiseman, 68 N. C. 203; State *v.* Battle, 7 Ala. 259; Taylor *v.* State, 35 Tex. 97; Wright *v.* State, 5 Ind. 290; Price *v.* State, 36 Miss. 533. The result is the same if the adjournment without a verdict is ordered with the express or implied consent of the defendant. Commonwealth *v.* Stowell, 9 Met. 572; State *v.* Slack, 6 Ala. 676.

[2]Nugent *v.* State, 4 Stew. & Port. 72; Commonwealth *v.* Fells, 9 Leigh, 620; Mahala *v.* State, 10 Yerg. 532; State *v.* Curtis, 5 Humph. 601; Hector *v.* State, 2 Mo. 166.

[3]People *v.* Goodwin, 18 Johns. 187; State *v.* Prince, 63 N. C. 529; Lester *v.* State, 33 Ga. 329; Moseley *v.* State, 33 Tex. 671; State *v.* Walker, 26 Ind. 346; Commonwealth *v.* Olds, 5 Lit. 140; Dobbins *v.* State, 14 Ohio St. 493; Ex parte McLaughlin, 41 Cal. 211; 10 Am. Rep. 272.

[4]See State *v.* Lee, 10 R. 1. 494; Casborus *v.* People, 13 Johns. 329; McKee *v.* People, 32 N. Y. 239; State *v.* Norvell, 2 Yerg. 24; Kendall *v.* State, 65 Ala. 492; State *v.* Redman, 17 Iowa, 329.

[1]Andrews *v.* Swartz, 156 U. S. 272; Allen *v.* State of Georgia, 166 U. S. 138; Ex parte Kinnebrew, 35 Fed. 52. But see *contra,* In re Roberts (Kan. App.) 45 P. 942.

[2]As to the meaning of this limitation, see *ante,* §§ 11, 12.

[3]See *ante,* § 13. It is lawful for the legislature to provide for the reduction in the term of service as a reward for good conduct, and this provision creates in the convicts a vested right, which cannot be taken away by subsequent legislation. In re Canfield, 98 Mich. 644. This is, likewise, the case with the provision for letting convicts out on their parole, in the discretion of the prison board, and their subsequent discharge from further custody, upon their continued maintenance of their record for good behavior for a stated period. George *v.* People, 167 Ill. 417.

[1]See City of Topeka *v.* Boutwell, 53 Kan. 20, where the question was raised but decided in favor of the regulations. See, also, Bronk *v.* Barckley, 13 App. Div. 72; 43 N. Y. S. 400, where the right to compel convicts to work for the profit of the State, and to regulate, limit and control such work, was not only conceded; but it was further held that, where the managers of a State prison had made a contract for convict labor, such contract cannot be impaired by subsequent constitutional or statutory legislation, limiting or prohibiting such convict labor.

[1]Georgia Penitentiary Co. *v.* Nelms, 65 Ga. 499 (38 Am. Rep. 793).

[2]Holland *v.* State, 23 Fla. 123; City of Topeka *v.* Boutwell, 53 Kan, 20.

[1]It is held in Arkansas that the lessee of the State penitentiary cannot hire out the convicts to others. Arkansas Industrial Co. *v.* Neel, 48 Ark. 283.

[1]Harrison *v.* Baltimore, 1 Gill, 264. In this case it was held that it was competent for the health officer to send to the hospital persons on board of an infected vessel who have the infectious disease, and all others on board who may be liable to the disease, if it be necessary, in his opinion, to prevent the spread of the disease. The same conclusion was reached as to the constitutional sanction of the summary detention and disinfection, by order of the State, or other local board of health, of immigrants and others who may be likely to spread contagious and infectious diseases. In re Smith, 84 Hun, 465; Minneapolis, St. P. & S. S. M. Ry. *v.* Milner, 57 Fed. 276; Compagnie Francaise de Navigation a Vapeur *v.* State Board of Health, 51 La. Ann. 645.

[1]Recently, a committee of the New York Board of Health, which had been appointed to report on the care and treatment of cases of tuberculosis, recommended that a hospital for the exclusive treatment of consumptives, be established, and urged that legislation be sought, whereby tuberculosis may be treated by the Board of Health as any other contagious disease, and the sufferers from this deadly disease be isolated from the rest of the people. The Board adopted the report of the committee and resolved to take steps to carry the recommendations of the committee. Should the legislature indorse this view of tuberculosis, and empower the boards of health to isolate the victims of this disease, there is no room for questioning the constitutionality of the legislation.

[1]It has been held in California that the business of maintaining a private asylum, cannot be prohibited. Ex parte Whitwell, 98 Cal. 73. I do not consider this a very reliable precedent for the reasons set forth at length in *post,* §§ 120 *et seq.*

[1]For a careful, able, and elaborate discussion of the rights of the insane, and of the power of the State over them, see Judge Cooley's opinion in the case of Vandeusen *v.* Newcomer, 40 Mich. 90.

[2]Preface to Harrison's Legislation on Insanity.

[1]As to the necessity of adjudication in any case of confinement of the insane, see *post,* p. 128 *et seq.*

[2]Cooley on Torts, 179.

[1]The opinion of Judge Cooley in Van Deusen *v.* Newcomer, 40 Mich. 90, supports them in the main.

[1]Colby *v.* Jackson, 12 N. H. 526; Brookshaw *v.* Hopkins, Loff. 235; Williams *v.* Williams, 4 Thomp. & C. 251; Scott *v.* Wakem, 3 Fost. & Fin. 328; Lott *v.* Sweet, 33 Mich. 308.

[2]Colby *v.* Jackson, 12 N. H. 526; Matter of Oaks, 8 Law Reporter, 122; Com. *v.* Kirkbride, 3 Brewst. 586. See Ayers *v.* Russell, 50 Hun, 282; Porter *v.* Ritch, 70 Conn. 235.

[3]Harrison's Legislation on Insanity; Look *v.* Dean, 108 Mass. 116 (11 Am. Rep. 323).

[1]See Hinchman *v.* Richie, 2 Law Reporter (n. s.), 180; Van Duesen *v.* Newcomer, 40 Mich. 90; Fletcher *v.* Fletcher, 1 El. & El. 420; Denny *v.* Tyler, 3 Allen, 225; Davis *v.* Merrill, 47 N. H. 208; Cooley on Torts, 179; Look *v.* Dean, 108 Mass. 116 (11 Am. Rep. 323); Ayers *v.* Russell, 50 Hun, 282. In many of the States, statutes provide for the intervention of a court in every case of permanent confinement, to the extent of requiring the physician's certificate of insanity, before a permanent commitment may be made, and leave it to the discretion of the judge, whether the person, whose commitment is sought, shall be brought before him, or should receive notice of the pending inquiry into his sanity, notwithstanding the absence from the proceedings of

the ordinary formalities which are generally held to be necessary to make a judicial proceeding "due process of law." Thus, in the recent case of Chavannes *v.* Priestley, 80 Iowa, 316, it was held that it was not necessary to a lawful committal that an insane person should be present and be heard in his defense, where the commissioners of lunacy, before whom the inquiry was conducted, upon previous inquiry should ascertain that such notice and presence would be injurious to the insane person. The court say: "Now it is easy to imagine a case in which such presence could not with safety to the person be had, nor could such a hearing with safety be had in his presence, and such persons are those most likely to need the beneficial provisions of the law, and they must be deprived of them if there is a constitutional barrier to these proceedings in their absence, and without notice. * * * The law and the courts are so jealous of the rights of persons, both as to liberty and property, that they view with distrust any proceedings that may affect such rights in the absence of notice, and to our minds this same jealousy pervades the statute in question, and the ruling consideration in allowing these proceedings, in the absence of the party and without notice, is personal to him and designed for him. It is not a case in which he is adjudged at fault or in default, and for which there is a forfeiture of liberty or property, but only a method by which the public discharges its duty to a citizen. * * * The law contemplates the presence of a person whose insanity is sought to be established in all cases except where, upon inquiry, it is made to appear that such presence would probably be injurious to the person or attended with no advantage to him."

In Fant *v.* Buchanan (Miss.), 17 So. 371, it was held that the provision of the Mississippi Code of '92 for a jury of six in inquests of unacy, did not violate the constitutional requirement of "due process of law."

[1]This has been the conclusion of the Minnesota courts in the recent cases of State *v.* Billings, 55 Minn. 474, and State ex rel. Kelly *v.* Kilbourne, 68 Minn. 320. In the case of State *v.* Billings, the court say: "It may be stated generally that due process of law requires that a party shall be properly brought into court, and that he shall have an opportunity, when there, to prove any fact which, according to the constitution and the usages of the common law, would be a protection to him or to his property. People *v.* Board of Supervisors, 70 N. Y. 228. Due process of law requires an orderly proceeding adapted to the nature of the cases in which the citizen has an opportunity to be heard, and to defend, enforce, and protect his rights. A hearing, or an opportunity to be heard, is absolutely essential. 'Due process of law' without these conditions cannot be conceived. Stewart *v.* Palmer, 74 N. Y. 183. It follows that any method of procedure which a legislature may, in the uncontrolled exercise of its power, see fit to enact, having for its purpose the deprivation of a person of his life, liberty, or property, is in no sense the process of law designated and imperatively required by the constitution. And while the State should take charge of such unfortunates as are dangerous to themselves and to others, not only for the safety of the public, but for their own amelioration, due regard must be had to the forms of law and to personal rights. To the person charged with being insane to a degree requiring the interposition of the authorities and the restraint provided for, there must be given notice of the proceeding, and also an opportunity to be heard in the tribunal which is to pass judgment upon his right to his personal liberty in the future. There must be a

trial before judgment can be pronounced, and there can be no proper trial unless there is guaranteed the right to produce witnesses and to submit evidence. The question here is not whether the tribunal may proceed in due form of law, and with some regard to the rights of the person before it, but, rather, is the right to have it so proceed absolutely secured? Any statute having for its object the deprivation of the liberty of a person cannot be upheld unless this right is secured, for the object may be attained in defiance of the constitution, and without due process of law.

"Let us now turn to the statute in question. It must be observed at the outset that private, as well as public, hospitals are within its terms, and for this reason, if for no other, the rights of the citizen should be closely guarded. Section 17 requires that every person committed to custody as insane must be so committed in the manner thereafter prescribed. Section 19 provides that whenever the probate judge, or, in his absence, the court commissioner, shall receive information in writing (the form being given) that there is an insane person in his county needing care and treatment, he shall issue what is called a 'commission in lunacy' (the form thereof being prescribed) to two physicians, styled 'examiners in lunacy.' This section permits the filing of an information not even sworn to by anybody. That it has opened the door to wrong and injustice—to the making of very serious and unwarranted charges against others by wholly irresponsible and evil-minded persons—is evident, although the method of instituting the proceedings does not affect the validity of the act. The commission directs the two physicians designated, who, under section 18, must now possess certain qualifications, to 'examine' the alleged lunatic, and certify to the probate judge or court commissioner, within one day after their examination, the result thereof, with their recommendation as to the special action necessary to be taken. The form of this certificate and recommendation is laid down in section 20. This certificate must be duly sworn to or affirmed before the officer issuing the commission. Section 21. If (section 19) the examiners certify that the person examined is sane, the case shall be dismissed. If they disagree, the officer shall call other examiners, or take further testimony. If they certify the person to be insane, and a proper subject for commitment, for any of the reasons specified in section 17, it is made the duty of the officer to visit the alleged insane person, or to require him to be brought into court; 'but he shall cause him to be fully informed of the proceedings being taken against him.' If the officer deems it advisable, he may call other examiners, or take further testimony, and in all cases, 'before issuing a warrant of commitment,' the county attorney shall be informed, and it is made his duty to take such steps as are deemed necessary to protect the rights of such person. If satisfied that the person is insane, and that the reason for his commitment is sufficient, under the provisions of the act, the probate judge or the court commissioner approves the certificate of the examiners, and issues an order or warrant in duplicate, committing him to the custody of the superintendent of one of the State hospitals, or to the superintendent or keeper of any private hospital or institution for the insane, which, under the same law, has been duly licensed. This order or warrant may be executed by the sheriff or by a private individual, and through it the person named therein is placed in the custody of the superintendent or keeper to whom it may have been directed. There are some other provisions in respect to these commitments, but they have no bearing on the questions now before us, and we now reach a consideration of the controlling provisions of the statute. The commission issues to the examiners, and they are authorized and directed

to 'examine' the alleged lunatic. Their examination is not made under oath. It may be formal or informal, as they choose, and the person under examination may not have the slightest idea that he is the subject of inquiry or investigation. The examination may be at any place where the subject can be found, or at a place convenient for the examiners. It may be public or private, and, judging from the questions found in the form to be answered by the examiners, it may consist simply in observing the alleged lunatic, and in making inquiries of him or of his acquaintances, or, for that matter, accepting common street gossip. * * * When this examination, of which the subject need not be informed, and in which he takes no part, is completed, the examiners are required to make a verified written report and recommendation, and on this the officer may commit without any other or further act, except that he must see the subject, either in or out of court, informing him fully of the proceedings, and must also notify the county attorney of what is going on. Not until after the examination, report, and recommendation, upon which the officer may commit, if he so chooses, need there be any notice whatsoever to the person charged with being a proper subject for the insane asylum, nor need the county attorney be advised of the proceeding. If personal rights are of any consequence, and if they need protection at any time, such notice should precede the examination, not follow it. But, aside from this serious defect in the law, it will be seen that there is no provision which assures to the accused a trial at any time, either before or after notice, under the forms of law; no provision which guaranties to him a judicial investigation and a determination as to his sanity. The officer before whom the inquiry is pending is nowhere required to conduct his examination with the least regard to the rights of the person charged with being insane,—his right to exercise his faculties without unwarranted restraint, and to follow any lawful avocation for the support of life. Nor is the officer obliged to hear a particle of testimony, although he is at liberty so to do. The accused or the county attorney might appear before him with an army of volunteer witnesses; but if their testimony was received or heard, or if there was the slightest approach to a trial, it would be through the grace of the officer, not as a matter of right to the person whose personal liberty is jeopardized by the proceeding. We are not speaking of what every honorable and humane officer would do when a case was before him, but of what the statute will permit an officer to do. Further examination of this enactment need not be made, for enough has been said to establish its invalidity, and to indicate what outrages might be perpetrated under it. The objection to such a proceeding as that authorized by this statute does not lie in the fact that the person named may be restrained of his liberty, but in allowing it to be done without first having a judicial investigation to ascertain whether the charges made against him are true; not in committing him to the hospital, but in doing it without first giving him an opportunity to be heard. We are compelled to the conclusion that the enactment of the sections referred to is unconstitutional, because they allow and sanction a denial of the protection of the law, and the deprivation of personal liberty without due process of law."

[1]But see Rider *v.* Regan, 114 Cal. 667. In this case, the statute authorized, in the event of the hopeless insanity of husband or wife, the sane spouse, on the order of the probate court, after due notice to the nearest relative of the insane person, to sell or mortgage the homestead. The statute was declared to be constitutional, and not a taking of property without due process of law.

[1]Ex parte Whitwell, 98 Cal. 273.

[1]Underwood *v.* People, 32 Mich. 1; Cooley on Torts, 178, n. 2.

[1]So strong an influence has this theory over the public mind that in a late number of the *North American Review,* a writer attempts to prove the "certainty of endless punishment" for the violation of God's laws, by showing *inter alia* that even human laws are retributive and not corrective, that a criminal is punished for the vindication of a broken law, and not that crime may be prevented. See vol. 140, p. 154.

[1]Matter of Baker, 29 How. Pr. 486.

[2]Matter of James, 30 How. Pr. 446.

[1]But see Com. *v.* Morrissey, 157 Mass. 471.

[2]In State *v.* Ryan, 70 Wis. 676, the court, quoting this section of this book with approval, holds that a statute of Wisconsin—which provides that "any person charged with being a common drunkard shall be arrested and brought before a judge for trial, and if convicted shall be sentenced to confinement in an asylum"—is unconstitutional, because its enforcement deprives a person of his liberty without due process of law. In Wisconsin Keeley Institute Co. *v.* Milwaukee County, 95 Wis. 153, the same court held that the statutory provision for the treatment of habitual drunkards in private institutions at the expense of the counties, where the drunkard has not the means of paying for the treatment, was unconstitutional, in that it imposed upon the counties a tax for the benefit of private individuals who were not the legitimate objects of public charity.

[1]Matter of Janes, 30 How. Pr. 446.

[1]See 2 Broom & Hadley's Com. 467, 468.

[1]People *v.* Forbes, 4 Park. 611. See, also, in affirmance of the constitutionality of vagrant law, People *v.* Phillips, 1 Park. 95; People *v.* Gray, 4 Park. 616; State *v.* Maxey, 1 McMull, 501.

[1]Ex parte Smith, 135 Mo. 223. See, to the same effect, on same ordinance, City of St. Louis *v.* Roche, 128 Mo. 541.

[2]The religious aspect of the question is not considered here.

[1]Town of Crafstboro *v.* Town of Greensboro, 66 Vt. 585. See, also, on the New England Poor Laws, Worcester *v.* East Montpelier, 61 Vt. 139; Lewiston *v.* N. Yarmouth, 5 Greenl. 66; Goshen *v.* Richmond, 4 Allen, 458; Bridgewater *v.* Plymouth, 97 Mass. 382; Endicott *v.* Hopkinton, 125 Mass. 521; Cambridge *v.* Boston, 130 Mass. 357; Goshen *v.* Stonington, 4 Conn. 209 (10 Am. Dec. 121).

[1]Rev. Stat. Ohio, § 2108.

[2]Morgan *v.* Nolte, 37 Ohio St. 23 (41 Am. Rep. 485); Blackburn *v.* State, 50 Ohio St. 428; Byers *v.* Commonwealth, 42 Pa. St. 96; World *v.* State, 50 Md. 54; Commonwealth *v.* Hopkins, 2 Dana, 418. In Commonwealth *v.* Graves, 155 Mass. 164, the court says: "In punishing offenses committed (the habitual criminal act) after its passage, it punishes the offenders for a criminal habit whose existence cannot be proved without showing their voluntary criminal act done after they are presumed to have had knowledge of the statute. Such an act is a manifestation of the habit, which tends to establish and confirm it, and for which the wrong-doer may well be held responsible. That statutes of this kind are constitutional is settled by well considered adjudications of this court." Ross's Case, 2 Pick. 165; Com. *v.* Phillips, 11 Pick. 28; Plumbly *v.* Com., 2 Met. 413; Com. *v.* Hughes', 133 Mass. 496; Com. *v.* Marchand, 155 Mass. 8; Sturtevant *v.* Commonwealth, 158 Mass. 598.

[1]Commonwealth *v.* Hopkins, 2 Dana, 418.

[1]See Stephen's Dig. of Crim. Law, art. 193.

[2]Morgan *v.* Nolte, 37 Ohio St. 23 (41 Am. Rep. 485). And it is also held to be constitutional to provide for the punishment of such offenses by a summary conviction without jury trial. Byers *v.* Commonweath, 42 Pa. St. 89.

[1]Commonwealth *v.* Hopkins, 2 Dana, 418. In the following opinion is discussed the amount and character of the evidence required to convict one of being a common thief: "The act of the assembly under which appellant was indicted, provides that 'any evidence of facts or reputation, proving that such a person is habitually and by practice a thief, shall be sufficient for his conviction, if satisfactorily establishing the fact.' In order to justify a conviction of a party of the offense created by the act, there must be proof of either facts or reputation, sufficient to satisfy the jury that the party accused is by *practice* and *habit* a thief. The offense is but a misdemeanor, and it must, therefore, be prosecuted within one year from the time of its commission. It is necessary, in order to justify conviction, that the proof should establish the fact that the accused was 'a common thief' within one year before the prosecution was begun, and therefore, evidence of 'acts of larceny,' committed more than a year before the indictment was found, would not be admissible. Though the conviction of the accused of the larceny of a watch was within a year before this prosecution was begun, it was contended that, standing alone, it was not sufficient to prove that the accused was by *habit* and *practice* a thief, and that it was not admissible, unless connected with an offer to follow it up with other proof to the same point, and that, as no such offer was made, the criminal court erred in admitting it. It did not matter that the record of the conviction of the accused, of larceny in 1877, did not prove the whole issue. The court had no right to require the State's attorney to disclose in advance what other proof he intended to offer. While the record of conviction was not of itself legally sufficient to convict, it was a link in the chain of evidence admissible *per se,* when offered, as tending to prove the issue. Its legal effect was a question for the jury to determine, they being under our constitution the judges of the law and the facts in criminal cases. So also with respect to the objection to the evidence of the reputation of the accused, as given by the police officer. Reputation is but a single fact, and the whole may be given in evidence, commencing at a period more than a year before the indictment

was found. The reputation which the accused bore at a time more than a year before the indictment, was admissible, though it would not of itself justify a conviction, and unless followed up with proof that such reputation continued, and was borne by the accused within a year before the indictment was found." World v. State, 50 Md. 4.

[1]32 and 33 Vict., ch. 99. See Polizeiaufsicht in Von Holtzendorff's Rechtslexikon, vol. 2, pp. 322, 323.

[2]Dunn *v.* Commonwealth (Ky. '99), 49 S. W. 813.

[1]See *post,* §§ 195, 196*a.*

[1]Christiancy, J., in People *v.* Plank Road Co., 9 Mich. 285.

[1]"In cases of writs of *habeas corpus* to bring up infants, there are other rights besides the rights of the father. If improperly or illegally restrained, it is our duty, *ex debitio justitiæ* to liberate. The welfare and rights of the child are also to be considered. The disability of minors does not make slaves or criminals of them. They are entitled to legal rights, and are under legal liabilities. An implied contract for necessaries is binding on them. The only act which they are under a legal incapacity to perform, is the appointment of an attorney. All their other acts are merely voidable or confirmable. They are liable for torts and punishable for crime. Every child over ten years of age may be found guilty of crime. For robbery, burglary or arson, any minor may be sent to the penitentiary. Minors are bound to pay taxes for support of the government, and constitute a part of the militia, and are compelled to endure the hardship and privation of a soldier's life, in defense of the constitution and the laws; and yet it is assumed that to them liberty is a mere chimera. It is something of which they may have dreamed, but have never enjoyed the fruition.

"Can we hold children responsible for crime, liable for torts, impose onerous burdens upon them, and yet deprive them of the enjoyment of liberty without charge or conviction of crime? The bill of rights declares that 'all men are, by nature, free and independent, and have certain inherent and inalienable rights—among these are life, liberty, and the pursuit of happiness.' This language is not restrictive; it is broad and comprehensive, and declares a grand truth; that 'all men,' all people, everywhere, have the inherent and inalienable right to liberty. Shall we say to the children of the State, you shall not enjoy this right—a right independent of all human laws and regulations? It is declared in the constitution; is higher than the constitution and law, and should be held forever sacred.

"Even criminals cannot be convicted and imprisoned without due process of law—without regular trial, according to the course of the common law. Why should minors be imprisoned for misfortune? Destitution of proper parental care, ignorance, idleness and vice, are misfortunes, not crimes. In all criminal prosecutions against minors for grave and heinous offenses, they have the right to demand the nature and cause of the accusation, and a speedy public trial by an impartial jury. All this must precede the final commitment to prison. Why should children, only guilty of misfortune, be deprived of liberty without 'due process of law?'

"It cannot be said that in this case there is no imprisonment. This boy is deprived of a father's care; bereft of home influences; has no freedom of action; is committed for an uncertain time; is branded as a prisoner; made subject to the will of others, and thus feels that he is a slave. Nothing could more contribute to paralyze the youthful energies, crush all noble aspirations and unfit him for the duties of manhood. Other means of a milder character; other influences of a more kindly nature; other laws less in restraint of liberty would better accomplish the reformation of the depraved, and infringe less upon inalienable rights." People *v.* Turner, 55 Ill. 280. But see *contra,* Ex parte Ferrier, 103 Ill. 367 (42 Am. Rep. 10).

[1]See *post,* § 196*a.*

[1]Prescott *v.* State, 19 Ohio St. 184 (2 Am. Rep. 388). The following provisions of the present charter of the city of New York may be of value in explaining the scope of the power of the State in controlling the liberty and providing for the welfare of children, who otherwise might become dangerous elements of society.

"Each Commissioner [of Public Charities] shall have authority, and it shall be his duty, to visit and inspect, personally, or by his agent, all charitable, eleemosynary, and reformatory institutions, wholly or partly under private control, which are situated or hereafter established within the borough or boroughs for which he is appointed, or which receive inmates from such borough or boroughs, and which demand or receive payment from the City of New York for the care, support, or maintenance of inmates. No payment shall be made to any such last-mentioned institution by the City of New York for the care, support, or maintenance of any inmate except upon the certificate of said Commissioner, or his deputy, showing that said inmate has been accepted by such Commissioner, pursuant to the rules and regulations established by the State Board of Charities, as a proper public charge for the period for which payment is demanded.

"Each Commissioner shall have power to indenture, place out, discharge, transfer, or commit any child for whose care, support, or maintenance payment from the City of New York is demanded or received by any of the aforesaid institutions, which are wholly or partly under private control, or who may be in his custody, whenever, in his judgment, it shall be for the best interests of such child so to do, and he and his successors in office shall have power to revoke or cancel any such indenture or agreement, and to make contracts for the maintenance of any such child in accordance with the general rules and regulations of the board; but, in indenturing, placing out, transferring, or committing any such child such Commissioner shall, when practicable, indenture or place out such child with an individual of the like religious faith as the parents of such child, or transfer or commit it to an institution governed by persons of the same religious faith.

"It shall be the duty of the Commissioner so notified to investigate forthwith the circumstances of the arrest and of the charge against such child, with a view of determining the *bona fides* of the same and of the merit of the claim for the support of such child as a public charge at the expense of the borough in which such arrest is

made, and the court or magistrate before which such proceeding is pending is hereby authorized, in its or his discretion, to adjourn such proceeding from time to time, pending such investigation by the Commissioner, and to send back the final report, when made, for further investigation and report, and to examine under oath the person or persons making such investigation on behalf of the Commissioner.

"The term of commitment of each child committed in the City of New York as constituted by this act under any of the provisions of Section 291 of the Penal Code or of Section 888 of the Code of Criminal Procedure, shall be until such child shall attain the age of sixteen years, or until, with the written consent of the Commissioner, it shall be duly bound out as an apprentice by the institution to which it shall have been committed, or until, with like consent, it shall be given over in adoption by the said institution to some suitable person, or until upon application by or upon due notice to the Commissioner any court or magistrate of the City of New York as constituted by this act authorized by law to make commitment under Section 291 of the Penal Code, shall, upon proof, to its or his satisfaction that the best interests of such child require its immediate discharge from commitment, make an order directing such discharge, or until upon at least five days' written notice to the Commissioner it shall be returned by such institution to the committing magistrate, court or official, as the case may be, on the stated ground that, in the opinion of said institution, said child is an improper subject for its further custody or care."

[1]Cooley on Const. Law, 77.

[2]1 Bl. Com. *441.

[1]1 Bl. Com. *446.

[2]See Inglis *v.* Sailor's Snug Harbor, 3 Pet. 99; Shanks *v.* Dupont, 3 Pet. 242; Stoughton *v.* Taylor, 2 Paine, 655; Jackson *v.* Burns, 3 Binn. 85.

[3]"In the first place, she was born under the allegiance of the British crown, and no act of the government of Great Britain has absolved her from that allegiance. Her becoming a citizen of South Carolina did not, *ipso facto,* work any dissolution of her original allegiance, at least so far as the rights and claims of the British crown were concerned." Shanks *v.* Dupont, 3 Pet. 242. See Talbot *v.* Janson, 3 Dall. 133; Isaac William's case, 2 Cranch, 82, note; Murray *v.* The Charming Betsey, 2 Cranch, 64; The Santissima Trinidad, 7 Wheat. 283; United States *v.* Gillies, 1 Pet. C. C. 159; Ainslee *v.* Martin, 9 Mass. 454.

[1]Act of July 27, 1868, 15 Stat. at Large, 223, 224.

[2]The United States have entered into such treaties with almost all the countries of Europe.

[1]The compulsory military service for four of the best years of a man's life has been the chief moving cause of emigration of the Germans.

[2]Phillemore International Law, 348, 349.

[1]While the above was being written, the world was startled by the expulsion from France of the Orleans and Bonaparte princes, who are in the line of inheritance of the lost crown. These princes were not charged with any offense against the existing government of France, or against France. They were monarchists, and, it is true, they refused to abjure their claims to the throne of France. But, beyond the formation of marital alliances with the reigning families of Europe, they were not charged with any actions hostile or menacing to the present government. The ineradicable antagonism between monarchy and republicism may possibly furnish justification for these expulsions; but one who has thoroughly assimilated the doctrine of personal liberty can hardly escape the conclusion that they were at least questionable exercises of police power.

[1]This is the rule of law in this country in respect to the legal status of the Indian. As long as he continues his connection with his tribe, and consequently occupies towards the United States a more or less foreign relation, it would be unwise as well as illogical to invest him with the rights of citizenship. Goodell *v.* Jackson, 20 Johns. 693, 710; McKay *v.* Campbell, 2 Sawyer, 118. But it is claimed, with much show of reason for it, that as soon as he abandons the tribal relation, and subjects himself to the jurisdiction of our government, he becomes as much a citizen of the United States as any other native. See Story on Constitution, § 1933.

[1]36 Fed. 431.

[1]In re Sing Lee, 54 Fed. 334, and In re Ching Jo, *Id.*

[1]But see, apparently, *contra,* as to what the act provides in respect to the burden of proof, United States *v.* Long Hop, 55 Fed. 58.

[2]See *post,* § 160 *et seq.*

[3]But defensive warfare must in this connection be distinguished from offensive warfare. The duty of the citizen to repel an attack upon his country is clear, but it is certainly not considered in the United States a duty of the citizen to aid the government in the prosecution of an offensive war, instituted for the purpose of aggrandizement. But the question involves the practical difficulty of determining which party in a particular war is on the defensive, and which is the attacking party. It is not necessary for the territory of one's country to be invaded, in order that the war may be offensive. Substantial and valuable international rights may be trespassed without a blow being struck or a foot of land invaded; and usually both parties claim to be on the defensive. But the difficulty in answering this question of fact does not affect the accuracy of the theoretic distinction, although it does take away its practical value.

[1]But it is now found to be more profitable, in combating the danger of fire in municipal life, to employ men who are specially charged with the performance of this duty. Voluntary, or unprofessional, fire departments are now to be found, in the United States, only in the villages and small towns.

[2]In Ohio, it was held that a statute, which required two days' labor on the public roads, did not violate the provision of the State bill of rights, that there shall be no involuntary servitude in the State. Dennis *v.* Simon, 51 Ohio St. 233

[1]Thus the intemperance of a man may result in the suffering of his wife from want, because of his consequent inability to earn the requisite means of support. But she may have been equally responsible for her own suffering on account of her recklessness in marrying him, or she may be extravagant and wasteful; or she may by her own conduct have driven him into intemperance, and many other facts may be introduced to render it very doubtful, to which of these moral delinquencies her suffering might be traced as the real moving cause.

[1]See Commonwealth *v.* Morrisey, 157 Mass. 471; City of Gallatin *v.* Tarwater, 143 Mo. 40, for judicial expressions of the constitutional authority of the legislature and city councils to punish drunkenness. In the latter case, the punishment was expressly limited to public drunkenness.

[1]Bertholf *v.* O'Reilly, 74 N. Y. 309, 509 (30 Am. Rep. 323). In this case it was held that the legislature has power to create a cause of action for damages, in favor of one who was injured in person or property by the act of an intoxicated person, against the owner of real property, whose only connection with the injury is that he leased premises, where liquor causing the intoxication was sold or given away, with the knowledge that the intoxicating liquors were to be sold thereon. "The act of 1873 is not invalid because it creates a right of action and imposes a liability not known to the common law. There is no such limit to legislative power. The legislature may alter or repeal the common law. It may create new offenses, enlarge the scope of civil remedies, and fasten the responsibility for injuries upon persons against whom the common law gives no remedy. We do not mean that the legislature may impose upon one man liability for an injury suffered by another, with which he has no connection. But it may change the rule of the common law, which looks only to the proximate cause of the mischief, in attaching legal responsibility, and allow a recovery to be had against those whose acts contributed, though remotely, to produce it. This is what the legislature had done in the act of 1873. That there is or may be a relation in the nature of cause and effect, between the act of selling or giving away intoxicating liquors, and the injuries for which a remedy is given, is apparent, and upon this relation the legislature has proceeded in enacting the law in question. It is an extension by the legislature, of the principles expressed in the maxim *sic utere tuo ut alienum non lædas* to cases to which it has not before been applied, and the propriety of such an application is a legislative and not a judicial question." Somewhat similar to the rule laid down in Bertholf *v.* O'Reilly, is that which subjects to criminal liability the owners of buildings, and their agents, who let property to persons who they know will use the property for the purposes of prostitution. When property is thus leased, with knowledge of the unlawful use to which it will be put, the party leasing becomes, under the statutes regulating the same, a *particeps criminis,* and the cases are quite numerous in which the lessor or his agent has under such circumstances been punished. See State *v.* Frazier, 79 Me. 95; State *v.* Smith, 15 R. I. 24; Troutman *v.* State, 49 N. J. L. 33; People *v.* O'Melia, 67 Hun, 653; Fisher *v.* State, 2 Ind. App. 365;

Borches *v.* State, 31 Tex. Cr. 517; Swaggart *v.* Territory, (Okl. '98), 50 Pac. 96. The same ruling has been made in England. Hornsby *v.* Raggett (1892), 1 Q. B. 20.

[1]See *post,* § 126.

[1]Bodenhauer *v.* State, 60 Ark. 10.

[2]This subject is more fully discussed elsewhere, see *post,* § 121.

[3]State *v.* Botkin, 71 Iowa, 87; Ex parte Johnson, 73 Cal. 228; Commonwealth *v.* Ferry, 146 Mass. 203; Weideman *v.* State, 4 Ind. App. 397; Hawkins *v.* Lutton, 95 Wis. 492.

[4]Davis *v.* State, 92 Ga. 458; Jackson *v.* State, 91 Wis. 253; Mitchell *v.* State, 81 Ga. 458; Gaunt *v.* State, 52 N. J. L. 178; State *v.* Rinehart, 106 N. C. 787; State *v.* Dukes, 119 N. C. 782; Ledbetter *v.* State, 29 Tex. App. 349; Van Dolsen *v.* State, 1 Ind. App. 108; State *v.* Austin, 108 N. C. 780; Com. *v.* Kammerdiner, 165 Pa. St. 222.

[1]Skinner *v.* State, 87 Ala. 105; Dailey *v.* State, 27 Tex. App. 569.

[2]State *v.* Brast, 31 W. Va. 380; Comer *v.* State, 26 Tex. App. 509. But see, *contra,* Foster *v.* State, 84 Ala. 451. And in Borders *v.* State, 24 Tex. App. 333, it was held that the fact, that parties had resorted to a private residence for the purpose of gambling on previous occasions, did not make it a case of gambling in public places.

[3]People *v.* Sam Lung, 70 Cal. 515.

[4]State *v.* Griggs, 34 W. Va. 78; Covington *v.* State, 28 Tex. App. 225; Com. *v.* Wells, 110 Pa. St. 463.

[5]Wolsey *v.* Neely, 62 Ill. App. 141; State *v.* Gritzner, 134 Mo. 512.

[6]Nichols *v.* State, 111 Ala. 58; Day *v.* State, 27 Tex. App. 143; Dailey *v.* State, 27 Tex. App. 569; State *v.* Light, 17 Oreg. 358; State *v.* McDaniel, 20 Oreg. 523; Franklin *v.* State, 91 Ala. 23; Parmer *v.* State (Ga.), 16 S. E. 937.

[1]Commonwealth *v.* Warren, 161 Mass. 281; Ex parte Boswell, 86 Cal. 232.

[2]Cooley Const. Lim. *385.

[1]McMaster's Hist. of People of U. S., vol. I., p. 31.

[1]Story on the Constitution, § 1879.

[2]Story on Constitution, § 1879.

[3]See *post,* § 67.

[1]Shreveport *v.* Levy, 27 La. Ann. 671.

[2]Cooley Const. Lim. *469.

[1]Cooley Const. Lim. *471.

[1]See Donahue *v.* Richards, 38 Me. 376; Spiller *v.* Woburn, 12 Allen, 127.

[2]Speller *v.* Woburn, 12 Allen, 127. In Iowa by statute it was provided that the Bible shall not be excluded from the public schools but that no pupil shall be required to read it contrary to the wishes of his parent of guardian. In declaring the statute to be constitutional, the court says: "The plaintiff's position is that by the use of the school-house as a place for reading the Bible, repeating the Lord's prayer and singing religious songs, it is made a place of worship; and so his children are compelled to attend a place of worship, and he, as a taxpayer, is compelled to pay taxes for building and repairing a place of worship. We can conceive that exercises like those described might be adopted with other views than those of worship, and possibly they are in the case at bar; but it is hardly to be presumed that this is wholly so. For the purposes of the opinion it may be conceded that the teachers do not intend wholly to exclude the idea of worship. It would follow that the school-house is, in some sense, for the time being, made a place of worship. But it seems to us that if we should hold that it is made a place of worship within the meaning of the constitution, we should put a very strained construction upon it.

"The object of the provision, we think, is not to prevent the casual use of a public building as a place for offering prayer, or doing other acts of religious worship, but to prevent the enactment of a law, whereby any person can be compelled to pay taxes for building or repairing any place, designed to be used distinctively as a place of worship. The object, we think, was to prevent an improper burden. It is, perhaps, not to be denied that the principle, carried out to its extreme logical results, might be sufficient to sustain the appellant's position, yet we cannot think that the people of Iowa, in adopting the constitution, had such an extreme view in mind. The burden of taxation by reason of the casual use of a public building for worship, or even such stated use as that shown in the case at bar, is not appreciably greater. We do not think indeed that the plaintiff's real objection grows out of the matter of real taxation. We infer from his argument that his real objection is that the religious exercises are made a part of the educational system into which his children must be drawn, or made to appear singular, and perhaps be subjected to some inconvenience. But so long as the plaintiff's children are not required to be in attendance at the exercises, we cannot regard the objection as one of great weight. Besides, if we regard it as of greater weight than we do, we should have to say that we do not find anything in the constitution or law upon which the plaintiff can properly ground his application for relief." Moore *v.* Moore, 64 Iowa, 367 (52 Am. Rep. 444). See, in support of the text, State *v.* District Board of School Dist. No. 8, 76 Wis. 177; Barrett *v.* City of Winnepeg, 19 Canada S. C. 374; Stevenson *v.* Hanyen, 7 Pa. Dist. 585; 9 Kulp. 256. In Michigan it has been held very recently, that provision for the reading of the Bible in the schools at the close of the secular exercises does not constitute a violation of the religious liberty of the pupils, where no pupils are to attend the religious exercises against the expressed wishes of the parents. Pfeifer *v.* Bd. of Education of Detroit (Mich. '98), 77 N. W. 250.

[1]Baxter *v.* McDonnell, 155 N. Y. 83; First Presbyterian Church of Perry *v.* Myers, 5 Okl. 809.

[2]Walworth, Chancellor, in Baptist Church *v.* Wetherell, 3 Paige, 296 (24 Am. Dec. 223). "In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations, to assist in the expression and dissemination of any religious doctrine and to create tribunals for the decision of controverted questions of faith within the association and for the ecclesiastical government of all the individual members, congregations and officers within the general associations is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for." Watson *v.* Jones, 13 Wall. 679. See, also, Sohier *v.* Trinity Church, 109 Mass. 1; Lawyer *v.* Cipperly, 7 Paige, 281; Robertson *v.* Bullions, 11 N. Y. 243; Bellport *v.* Tooker, 21 N. Y. 267 (29 Barb. 256); O'Hara *v.* Stack, 90 Pa. St. 477; Keyser *v.* Stansifer, 6 Ohio, 363; Shannon *v.* Frost, 3 B. Mon. 253; Lucas *v.* Case, 9 Bush, 297; Ferraria *v.* Vasconcellos, 31 Ill. 25; Calkins *v.* Chaney, 92 Ill. 463; German Congregation *v.* Pressler, 17 La. Ann. 127; Wheelock *v.* First Presbyterian Church, 119 Cal. 477; In re Election of Trustees of Bethany Baptist Church, 60 N. J. L. 88.

[1]Watson *v.* Jones, 13 Wall. 679; Smith *v.* Nelson, 18 Vt. 511; Hale *v.* Everett, 53 N. H. 9; Ferraria *v.* Vasconcellos, 31 Ill. 25; Watson *v.* Avery, 2 Bush, 332; Happy *v.* Morton, 93 Ill. 398.

[2]Waite *v.* Merrill, 4 Me. 102 (16 Am. Dec. 238); Scribner *v.* Rapp, 5 Watts. 311 (30 Am. Dec. 327).

[1]"When a civil right depends upon an ecclesiastical matter, it is the civil court and not the ecclesiastical which is to decide. But the civil tribunal tries the civil right and no more, taking the ecclesiastical decisions out of which the civil right arises as it finds them." Harmon *v.* Dreher, 2 Speer's Eq. 87.

"The entire separation of church and State is not the least of the evidences of the wisdom and forethought of those who made our nation's constitution. It was more than a happy thought, it was an inspiration. But although the State has renounced authority to control the internal management of any church, and refuses to prescribe any form of church government, it is nevertheless true that the law recognizes the existence of churches, and protects and assures their right to exist, and to possess and enjoy their powers and privileges. Of course, wherever rights of property are invalid,

the law must interpose equally in those instances where the dispute is as to church property as in those where it is not, and it also takes note of, but does not itself enforce, the discipline of the church, and the maintenance of church order and internal regulation." State *v.* Hebrew Congregation, 30 La. Ann. 205 (33 Am. Rep. 217). See, also, Watson *v.* Jones, 13 Wall. 679; Grosvenor *v.* United Society, 118 Mass. 78; Dieffendorf *v.* Ref. Col. Church, 20 Johns. 12; Baptist Church *v.* Wetherell, 3 Paige, 301 (24 Am. Dec. 223); People *v.* German Church, 53 N. Y. 103; Hendrickson *v.* Decon, 1 N. Y. Eq. 577; Den *v.* Bolton, 12 N. J. 206; McGinnis *v.* Watson, 41 Pa. St. 9; Wilson *v.* Johns Island Church, 2 Rich Eq. 192; Lucas *v.* Case, 9 Bush, 297; Chase *v.* Chaney, 58 Ill. 508; State *v.* Farris, 45 Mo. 183; Moseman *v.* Heitshousen (Neb.), 69 N. W. 957; Lemp *v.* Raven, 113 Mich. 375. See Fitzgerald *v.* Robinson, 112 Mass. 371, in which it was held that an excommunication would not be permitted to affect property and other civil rights.

[2]See *ante,* § 63.

[1]Vidal *v.* Girard's Exrs., 2 How. 127.

[1]People *v.* Ruggles, 8 Johns. 289 (5 Am. Dec. 335).

[2]State *v.* Chandler, 2 Harr. 553.

[3]Shaw, Ch. J., in Commonwealth *v.* Kneeland, 20 Pick. 206. See, also, People *v.* Ruggles, 8 Johns. 289 (5 Am. Dec. 335); Updegraph *v.* Com., 11 S. & R. 394; State *v.* Chandler, 2 Harr. 553; Andrew *v.* Bible Society, 4 Sandf. 156. Profanity, like obscene language, may always be prohibited. State *v.* Warren, 113 N. C. 683; Bodenhamer *v.* State, 60 Ark. 10; Ratteree *v.* State, 78 Ga. 335; McIver *v.* State (Tex. Cr. Rep.), 29 S. W. 1083.

[1]Kent, Ch. J., in People *v.* Ruggles, 8 Johns. 289 (5 Am. Dec. 225).

[1]Com. *v.* Kneeland, 20 Pick. 206, 220, see Updegraph *v.* Com., 11 S. & R. 394; People *v.* Ruggles, 8 Johns. 289 (5 Am. Dec. 335). In speaking of charitable uses, Judge Duer, in Ayres *v.* Methodist Church, 3 Sandf. 351, said: "If the Presbyterian and the Baptist, the Methodist and the Protestant Episcopalian, must each be allowed to devote the entire income of his real and personal estate, forever, to the support of missions, or the spreading of the Bible, so must the Roman Catholic his to the endowment of a monastery or the founding of a perpetual mass for the safety of his soul; the Jew his to the translation and publication of the Mishua, or the Talmud; and the Mohametan (if in that *colluries gentium* to which this city [New York], like ancient Rome, seems to be doomed, such shall be among us), the Mohametan his to the assistance or relief of the annual pilgrims to Mecca."

[1]Cooley on Torts, 34.

[2]Reynolds *v.* United States, 98 U. S. 145.

[3]Kerrigan *v.* Tabb, N. J. Eq. 39 A. 701. In this case the legacy was to a priest to be expended for masses for the repose of the soul of the testatrix. The legacy was held to

be valid and protected by this constitutional provision for religious liberty. See, also, to same effect, Hoeffner *v.* Clogan, 171 Ill. 462; Sherman *v.* Baker, 20 R. I. 613.

[1]See State *v.* White, 64 N. H. 48, where beating a drum in the streets was held to be disorderly conduct, notwithstanding it constituted a part of a religious exercise of the Salvation Army.

[1]See Atwood *v.* Welton, 7 Conn. 66.

[2]See Arnold *v.* Arnold, 13 Vt. 362; Hunscom *v.* Hunscom, 15 Mass. 184; Butts *v.* Swartwood, 2 Cow. 431; Cubbison *v.* McCreery, 7 Watts & S. 262; Jones *v.* Harris, 1 Strobh. 160; Blocker *v.* Burness, 2 Ala. 354; Brock *v.* Milligan, 10 Ohio, 121; Central R. R. Co. *v.* Rockafellow, 17 Ill. 541.

[3]Such a provision is to be found in Arkansas, California, Florida, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, Nevada, New York, Ohio, Oregon, Wisconsin.

[4]See Perry's Case, 3 Gratt. 632.

[1]See *post.*

[2]Terry, Ch. J., in Ex parte Newman, 9 Cal. 509.

[3]Opinion of Terry, Ch. J., 9 Cal., p. 509.

[1]Cooley's Const. Lim. *476.

[2]Burnett, J., in Ex parte Newman, 9 Cal. 510.

[3]"Under the constitution of this State, the legislature cannot pass any act, the legitimate effect of which is forcibly to establish any merely religious truth, or enforce any merely religious observances. The Legislature has no power over such a subject. When therefore a citizen is sought to be compelled by the legislature to do any affirmative religious act or to refrain from doing anything, because it violated simply a religious principle or observance, the act is unconstitutional." Burnett, J., in Ex parte Newman, 9 Cal. 510. See, also, Com. *v.* Has, 122 Mass. 40; Com. v. Specht, 8 Pa. St. 312; Com. *v.* Wolf, 3 Serg. & R. 48; Com. *v.* Nesbit, 34 Pa. St. 398; Hudson *v.* Geary, 4 R. I. 485; State *v.* Balt. & O. R. R., 15 W. Va. 362. (36 Am. Rep. 803); Charleston *v.* Benjamin, 2 Strobh. 508; McGatrick *v.* Wason, 4 Ohio St. 566; Johns *v.* State, 78 Ind. 332; Bohl *v.* State, 3 Tex. App. 683; State *v.* Bott, 31 La. Ann. 663 (33 Am. Rep. 224).

[1]Scott, J., in State *v.* Ambs, 20 Mo. 214, 216, uses this language: "Those who question the constitutionality of our Sunday laws seem to imagine that the constitution is to be regarded as an instrument formed for a State composed of strangers collected from all quarters of the globe, each with a religion of his own, bound by no previous social ties, nor sympathizing in any common reminiscences of the past; that unlike ordinary laws, it is not to be construed in reference to the State and condition of those

for whom it was intended, but that the words in which it is comprehended are alone to be regarded without respect to the history of the people for whom it was made. It is apprehended, that such is not the mode by which our organic law is to be interpreted. We must regard the people for whom it was ordained. It appears to have been made by Christian men. The constitution on its face shows that the Christian religion was the religion of its framers. * * * They, then, who engrafted on our constitution the principles of religious freedom contained therein, did not regard the compulsory observance of Sunday, as a day of rest, a violation of those principles. They deemed a statute compelling the observance of Sunday necessary to secure a full enjoyment of the rights of conscience. How could those who conscientiously believe that Sunday is hallowed time, to be devoted to the worship of God, enjoy themselves in its observance amidst all the turmoil and bustle of worldly pursuits, amidst scenes by which the day was desecrated, which they conscientiously believe was holy?" See also, Stover *v.* State, 10 Ark. 259, 263; Lindenmuller *v.* People, 33 Barb. 568.

[1]"Again it may be well considered that the amount of rest which would be required by one half of society may be widely disproportionate to that required by the other. It is a matter of which each individual must be permitted to judge for himself according to his own instincts and necessities. As well might the legislature fix the days and hours for work, and enforce their observance by an unbending rule which shall be visited alike upon the weak and strong; whenever such attempts are made, the law-making power leaves its legitimate sphere, and makes an incursion into the realms of physiology, and its enactments like the sumptuary laws of the ancients, which prescribe the mode and texture of people's clothing, or similar laws which might prescribe and limit our food and drink, must be regarded as an invasion, without reason or necessity, of the natural rights of the citizens, which are guaranteed by the fundamental law." Terry, Ch. J., Ex parte Newman, 9 Cal. 508.

[1]"It appears to us that if the benefit of the individual is alone to be considered, the argument against the law which he may make, who has already observed the seventh day of the week, is *unanswerable.*" Cooley's Const. Lim. *476, *477.

[2]"While I am thus resting on the Sabbath in obedience to law, it is right and reasonable that my rest should not be disturbed by others. Such a disturbance by others of my rest, is in its nature a nuisance, which the law ought to punish, and Sabbath-breaking has been frequently classed with nuisances and punished as such." State *v.* B. & O. R. R., 15 W. Va. 362 (36 Am. Rep. 803, 814.)

[1]In New York it has been held in a recent case that a law is constitutional which prohibits fishing on Sunday, even within the grounds of a private club. People *v.* Moses, 65 Hun, 161; *s. c.* 140 N. Y. 214. And in Missouri it has been held that athletic sports may be prohibited on Sunday. St. Louis Agricultural & Mechan. Assn. *v.* Delano, 108 Mo. 217; State *v.* Williams, 35 Mo. App. 541. In Rucker *v.* State, 67 Miss. 328, it was held that the law which prohibited playing at cards or dice on Sunday applied only to the doing of these things in public, and did not include such a game played in private. See also Gunn *v.* State, 89 Ga. 341 (hunting); State *v.* O'Rourke, 35 Neb. 614 (base ball); State *v.* Hognever, 152 Ind. 652 (do.). So far as these cases uphold the constitutional right of the legislature to prohibit on Sunday the

indulgence in quiet amusements, they can be supported on no other ground than that the State has the power to punish individuals who do not conform to the religious observance of the day.

[1]See *post,* § 206. The position assumed in the text, in regard to noiseless occupations, has been adopted in several recent cases, in which laws were sustained, as a constitutional exercise of police power, which prohibited barbers from plying their trade on Sunday. People *v.* Havnor, 149 N. Y. 195 (quoting text); State *v.* Granneman, 132 Mo. 326; People *v.* Buttling (N. Y.), 13 Misc. Ref. 587; 35 N. Y. S. 19; People *v.* Bellett, 99 Mich. 151 (quoting text); Keck *v.* City of Gainesville, 98 Ga. 423. In Eden *v.* People, 161 Ill. 296; Nesbit *v.* State (Kans. App.), 54 P. 326; State *v.* Petit (Minn.), 77 N. W. 225; Breyer *v.* State (Tenn. '99), 50 S. W. 769, a similar law was held to be unconstitutional, not only because it was a special law discriminating against one particular calling, but because it was an unauthorized infringement of the religious liberty of the individual. See, also, to the same effect, Ex parte Jentzsch, 112 Cal. 468, and Ragio *v.* State, 2 Pickle (Tenn.), 272 (public bath rooms in barber shops).

[1]"The question arising under this act is quite distinguishable from the case where the legislature of a State, in which slavery is tolerated, passes an act for the protection of the slave against the inhumanity of the master in not allowing sufficient rest. In this State, every man is a free agent, competent, and able to protect himself, and no one is bound by law to labor for a particular person. Free agents must be left free as to *themselves.* Had the act under consideration been confined to infants, or to persons bound by law to obey others, then the question presented would have been very different. But if we cannot trust free agents to regulate their own labor, its time and quantity, it is difficult to trust them to make their own contracts. If the legislature could prescribe the 'days' of rest for them, then it would seem that the same power could prescribe hours to work, rest and eat." Burnett, J., in Ex parte Newman, 9 Cal. 510.

The position, which was assumed by the California courts in the case of Ex parte Newman, and afterwards abandoned in later decisions (see next note) seems to have been completely resumed in the case of Ex parte Jentzch, 112 Cal. 468; in which the Supreme Court declared a law unconstitutional, which prohibited barbers from plying their trade on Sunday. The court in this case repudiate the doctrine set forth in the text, and the dissenting opinion of Justice Field in the case of Ex parte Newman, that the inability without Sunday laws of the employe, to secure the liberty of resting from his labor on Sunday, was a justification of those laws. Legislation on those grounds has too much of the paternal character to be justifiable under our constitutional limitations, and violates the fundamental American principle of the equality of all men before the law. See in Chapter I. an extensive quotation from this decision.

A similar position has been taken in the case of Eden *v.* People, 161 Ill. 296. In Illinois, the Supreme Court has taken a decided stand against the constitutionality of all laws, which interfere with the individual's liberty of contract, even denying the constitutionality of a law which prohibited women from working in factories and workshops for more than forty-eight hours per week. In Eden *v.* People, *supra,* the

court say: “If the legislature has no power to prohibit by law a woman from being employed in a factory or workshop more than eight hours in any one day, or forty-eight hours in a week, upon what principle, it may be asked, has the legislature the right to prohibit a barber from laboring and receiving the fruits of his labor during any number of hours he may desire to work during the week? Moreover, if the merchant, the grocer, the butcher and druggist, and other trades and callings are allowed to open their places of business and carry on their respective avocations during seven days of the week, upon what principle can it be held that a person who may be engaged in the business of barbering may not do the same thing? * * * “As has been heretofore seen, as a general rule a police regulation has reference to the health, comfort, safety and welfare of society. How, it may be asked, is the health, comfort, safety or welfare of society to be injuriously affected by the keeping open a barber shop on Sunday? It is a matter of common observation that the barber business, as carried on in this State, is both quiet and orderly. Indeed, it is shown by the evidence incorporated in the record that the barber business, as conducted, is quiet and orderly, much more so than many other departments of business. In view of the nature of the business, and the manner in which it is carried on, it is difficult to perceive how the rights of any person can be affected, or how the comfort or welfare of society can be disturbed.”

[1]Dissenting opinion of Judge Field in Ex parte Newman, 9 Cal. 502, 518. The opinion of Judge Field although rejected by the majority of the court in Ex parte Newman, was after a change in the *personnel* of the court adopted as the rule in California in Ex parte Andrews, 18 Cal. 678, and was affirmed in many other later cases, the last being Ex parte Burke, 59 Cal. 6 (43 Am. Rep. 231); Ex parte Roser, 60 Cal. 177. But see in approval of Ex parte Newman, Ex parte Jentzch, 112 Cal. 468, cited fully in a preceding note.

[2]Vogelsang *v.* State, 9 Ind. 112; Shover *v.* State, 10 Ark. 259; Warne *v.* Smith, 8 Conn. 14; Lindenmuller *v.* People, 33 Barb. 549; Story *v.* Elliott, 8 Cow. 27; Johnston *v.* Com., 10 Harris, 102; Bloom *v.* Richards, 2 Ohio, 387; City Council *v.* Benjamin, 2 Strobh. 529; State ex rel. Walker *v.* Judge, 39 La. Ann. 132; State *v.* Fernandez, 39 La. Ann. 538; Swann *v.* Swann, 21 Fed. Rep. 299; Commonwealth *v.* Starr, 144 Mass. 359 (11 N. E. 533, note); Friedeborn *v.* Commonwealth, 113 Pa. St. 242; Scales *v.* State, 47 Ark. 476; Judefind *v.* State, 78 Md. 510; Specht *v.* Com., 8 Pa. St. 312. In the last case, the court expresses itself thus: “It intermeddles not with the natural and indefeasible right of all men to worship Almighty God according to the dictates of their own consciences; it compels none to attend, erect or support any place of worship, or to maintain any ministry against his consent; it pretends not to control or to interfere with the rights of conscience, and it establishes no preference for any religious establishment or mode of worship. It treats no religious doctrine as paramount in the State; it enforces no unwilling attendance upon the celebration of divine worship. It says not to the Jew or Sabbatarian, ‘You shall desecrate the day, you esteem as holy, and keep sacred to religion that *we* deem to be so! It enters upon no discussion of the rival claims of the first or seventh days of the week, nor pretends to bind upon the conscience of any man any conclusion upon a subject which each must decide for himself. It intrudes not into the domestic circle to dictate when, where, or to what God its inmates shall address their orisons; nor does it presume to enter the synagogue of the Israelite, or the church of the seventh-day Christian to

command or even persuade their attendance in the temples of those who especially approach the altar on Sunday. It does not in the slightest degree infringe upon the Sabbath of any sect, or curtail their freedom of worship. It detracts not one hour from any period of time they may feel bound to devote to this object, nor does it add a moment beyond what they may choose to employ. Its sole mission is to inculcate a temporary weekly cessation from labor, but it adds not to this requirement any obligation." See, also, Searcy *v.* State (Tex. Cr. App. '99), 51 S. W. 1119.

In State *v.* Southern Ry. Co., 119 N. C. 814, a State law was upheld, which prohibited with certain exceptions, the running of railroad trains on Sunday, even though the law was applied to trains carrying freight across State lines. To the same effect, see Hennington *v.* State, 90 Ga. 396; State *v.* Railroad Company, 24 W. Va. 783. See *contra* as to through or interstate freight, Norfolk & Western Ry. Co. *v.* Commonwealth, 88 Va. 95. On the general proposition of the constitutionality of laws, prohibiting labor on Sunday, see Ex parte Marx, 86 Va. 40; Ex parte Sundstrom, 25 Tex. App. 133; Johnson *v.* People (Colo. App.), 40 P. 576; Quinlan *v.* Conlin, 34 N. Y. S. 952; 13 Misc. 568. In State *v.* Gelpi, 48 La. Ann. 520, a law was upheld, which required private clubs, in which liquor is sold to members exclusively, to be closed on Sunday. So, also, a State tax on the sale of Sunday issues of newspapers, whether published within or without the State, was held to be constitutional. Preston *v.* Finley, 72 Fed. 850; Thompson *v.* State, 17 Tex. App. 253; Baldwin *v.* State, 21 Tex. App. 591.

[1]In Charleston, S. C., it is said that an ordinance requires all vehicles on Sunday to pass the Jewish synagogues in a slow walk, in order to reduce disturbance of the worship to a minimum. The New York constitution, Art. I., § 3, and the Penal Code, § 271, prohibit the service on Hebrews of any process which is made returnable on Saturday. Martin *v.* Goldstein, 39 N. Y. S. 254.

[1]Cincinnati *v.* Rice, 15 Ohio, 225; Canton *v.* Nist, 9 Ohio St. 439. But one must observe the seventh day as a religious day in order that he may work on Sunday. Liberman *v.* State, 26 Neb. 464. But in the absence of statute, providing otherwise, the conscientious observance of the seventh day does not excuse the observance of Sunday. Parker *v.* State, 16 Lea (Tenn.), 476.

[2]Frolickstein *v.* Mobile, 40 Ala. 725.

[3]"The legislature obviously regarded it as promotive of the mental, moral and physical well-being of men, that they should rest from their labors at stated intervals; and in this all experience shows they were right. If then, rest is to be enjoined as a matter of public policy at stated intervals, it is obvious that public convenience would be much promoted by the community generally resting on the same day, for otherwise each individual would be much annoyed and hindered in finding that those with whom he had business to transact, were resting on the day on which he was working. The legislature, holding these views in selecting the particular day of rest, doubtless selected Sunday, because it was deemed a proper day of rest by a majority of our people who thought it a religious duty to rest on that day; and in selecting this day for these reasons, the legislature acted wisely. The law requires that the day be observed

as a day of rest, not because it is a religious duty, but because such observance promotes the physical, mental and moral well-being of the community, and Sunday is selected as the day of rest, because if any other day had been named, it would have imposed unnecessarily onerous obligations on the community, inasmuch as many of them would have rested on Sunday as a religious duty, and the requirement of another day to be observed as a day of rest, would have resulted in two days being observed instead of one, and thus time would have been uselessly wasted. This I conceive is the main object of our law; but it is not its only object." State *v.* Balt. & O. R. R. Co., 15 W. Va. 362 (36 Am. Rep. 803, 814). An exemption of this kind was declared unconstitutional in Louisiana, because it discriminated between religious sects. Shreveport *v.* Levy, 26 La. Ann. 67. But it was held valid in Indiana. Johns *v.* State, 78 Ind. 332. In Simond's Exrs. *v.* Gratz, 2 Pen. & Watts, 412, it was held that it was no ground for a continuance that a Jew had conscientious scruples against attendance at the trial of his cause on Saturday.

[1]Mills *v.* Williams, 16 S. C. 594, 597; approving Hellams *v.* Abercrombie, 15 S. C. 110, 113; Bennett *v.* Brooks, 9 Allen, 118.

[2]Hinckley *v.* Penobscot, 42 Me. 89; Cratty *v.* Bangor, 57 Me. 423 (2 Am. Rep. 56); Johnson *v.* Irasburg, 47 Vt. 28 (19 Am. Rep. 111); Bosworth *v.* Swansey, 10 Met. 364; Connolly *v.* Boston, 117 Mass. 64 (19 Am. Rep. 396); Davis *v.* Somerville, 128 Mass. 594; Buck *v.* Biddeford, 82 Me. 433; Dougan *v.* State, 125 Ind. 130; Dorsey *v.* State, 125 Ind. 600. Traveling for pleasure in street cars now allowable in Connecticut. Horton *v.* Norwalk Tramway Co., 66 Conn. 272.

[1]See Davis *v.* Somerville, 128 Mass. 594; McClary *v.* Lowell, 44 Vt. 116 (8 Am. Rep. 366); Logan *v.* Matthews, 6 Pa. St. 417; Johnson *v.* People, 31 Ill. 469.

[2]Com. *v.* Jacobus, 1 Leg. Gaz. Rep. (Pa.) 491; State *v.* Schuler, 23 Wkly. Law Bul. 450; Commonwealth *v.* Waldman, 140 Pa. St. 89; State *v.* Wellott, 54 Mo. App. 310.

[3]Ungericht *v.* State, 119 Ind. 379.

[4]Com. *v.* Louisville & Nashville R. R. Co., 80 Ky. 291; Louisville & Nash. Ry. Co. *v.* Commonwealth (Ky.), 30 S. W. 878; Augusta & S. R. R. Co. *v.* Renz, 55 Ga. 126; Sullivan *v.* Maine Central Ry. Co., 82 Me. 196. See Jackson *v.* State, 88 Ga. 787.

[5]Sparhawk *v.* Union Passenger R. Co., 54 Pa. St. 401; Com. *v.* Jeandell, 2 Grant Cas. 506; McNeely *v.* State, 94 Ga. 592.

[6]Phil. & B. R. R. Co. *v.* Lehman, 56 Md. 209.

[7]Edgerton *v.* State, 69 Ind. 588.

[8]Turner *v.* State, 67 Ind. 595; Johnson *v.* People, 42 Ill. App. 594.

[9]Whitcomb *v.* Gilman, 35 Vt. 497. See Commonwealth *v.* Funk, 9 Pa. Co. Ct. Rep. 277, as to when it is necessary to work on Sunday to prevent a water overflow in oil-wells. To the same effect see Com. *v.* Gillespie, 146 Pa. St. 546.

[1]State *v.* Goff, 20 Ark. 289; Jones *v.* Andrews, 10 Allen, 18.

[2]Thus, a druggist is not allowed to sell soda water and other beverages. Splane *v.* Commonwealth (Pa.), 12 A. 431; Quinlan *v.* Conlin, 34 N. Y. S. 952; 13 Misc. 568. The continued operation on Sunday of an ice factory was held to be a work of necessity, as the stopping of the factory on Sunday would mean a loss of 24 to 30 hours on Monday in getting the factory in working order again. Hennersdorf *v.* State, 25 Tex. App. 597. The same ruling would apply to glass and other factories, where so much time is required in attaining the degree of temperature, high or low, which is needed in operating the factory. But not to the repair of a mill. Hamilton *v.* Austin, 62 N. H. 575. It is a work of necessity to shoe a stage horse. Nelson *v.* State, 25 Tex. App. 599. It is not a work of necessity to publish or sell a newspaper on Sunday. Handy *v.* St. Paul Globe Pub. Co., 41 Minn. 188; Commonwealth *v.* Matthews, 152 Pa. St. 166; Com. *v.* Suppert, 152 Pa. St. 169. So, likewise, the sale of cigars and tobacco. Commonwealth *v.* Marzynski, 149 Mass. 68; State *v.* Ohmer, 34 Mo. App. 115. It is a work of charity to subscribe on Sunday a sum of money for the liquidation of a church debt. Bryan *v.* Watson, 127 Ind. 42. So, also, telegraphic messages to members of one family, communicating important information, are works of necessity. Burnett *v.* West, Un. Tel. Co., 39 Mo. App. 599; West Un. Tel. Co. *v.* Wilson, 93 Ala. 32; West. Un. Tel. Co. *v.* Griffin, 1 Ind. App. 46.

[1]In Kansas and Missouri the sale of newspapers, which are devoted largely to the publication of scandals, immoral occurrences, etc., is prohibited; and the constitutionality of the law has been sustained. In re Banks, 56 Kans. 242; State *v.* Van Wye, 136 Mo. 227. So, also, has a law been upheld in Texas, which imposed a tax upon the Sunday issues of newspapers, whether they are published within or without the State. Preston *v.* Finley, 72 Fed. 850; Thompson *v.* State, 17 Tex. App. 253; Baldwin *v.* State, 21 Tex. App. 591.

[1]3 Pick. 304, 313. See, also, Story on Constitution, § 1889; 2 Kent, 17; Wharton's State Trials, 323; Respublica *v.* Dennie, 4 Yeates, 207 (2 Am. Dec. 402).

[1]A by-law of the Associated Press was sustained and enforced, which prohibited its members from receiving and publishing the regular news dispatches of any other news association which covered the same territory, and was organized for the purpose of supplying newspapers with telegraphic news. Mathews *v.* Associated Press, 61 Hun, 199; Bleistein *v.* Associated Press, *Id.*

[2]City of Norfolk *v.* Norfolk Landmark Co., 95 Va. 564.

[1]Cooley Const. Lim. 521 (*422). See In re Banks, 56 Kans. 242; Preston *v.* Finley, 72 Fed. 850; Thompson *v.* State, 17 Tex. App. 253; Baldwin *v.* State, 21 Tex. App. 591, cited in preceding note on page 229. It has been held to be lawful for State law to provide for the punishment of publishers of newspapers for publishing false reports of the proceedings of a court. State *v.* Faulds, 17 Mont. 140. It is also a constitutional interference with freedom of speech, for a law to prohibit the use of profane language in any public place. State *v.* Warren, 113 N. C. 683. It has likewise been held to be lawful, and not in violation of the constitutional guaranty of freedom of speech, to

prohibit creditors from publishing the names of their debtors as bad debtors. State *v.* McCabe, 135 Mo. 450. On the other hand, it has been held to be unlawful for a court to prohibit the performance of a play during the pendency of a murder trial, because the play was founded upon facts which were involved in the criminal case then pending. Dailey *v.* Superior Court of San Francisco, 112 Cal. 94. Nevertheless, if the publication of an item constitutes a contempt of court, according to the common and statutory law, the publisher may be punished, without any interference with the constitutional guaranty of the liberty of the press. State *v.* Tugwell, 19 Wash. St. 238 (52 P. 1056). But a judicial officer, who is a candidate for re-election, cannot object to newspaper criticisms of his judicial acts, as constituting a case of contempt of court. State *v.* Circuit Court of Eau Claire County, 97 Wis. 1.

[1]Schuyler *v.* Curtis, 70 Hun, 598, 30 Abb. N. C. 376.

[2]Commonwealth *v.* Abrahams, 156 Mass. 57; Davis *v.* Commonwealth of Massachusetts, 167 U. S. 43.

[3]United States *v.* Harmon, 45 Fed. 414. In Ex parte Rapier, 143 U. S. 110, it was held to be lawful for the postal authorities to exclude from the mail newspapers which contained advertisements of the Louisiana Lottery.

[1]Hoover *v.* McChesney, 81 Fed. 472.

[1]Austin *v.* State, 10 Mo. 591.

[2]People *v.* Warden of City Prison, 144 N. Y. 529.

[1]Cooley on Torts, p. 277. “No proposition is now more firmly settled than that it is one of the fundamental rights and privileges of every American citizen to adopt and follow such lawful industrial pursuits, not injurious to the community, as he may see fit. Slaughterhouse Cases, 16 Wall. 106; Corfield *v.* Coryell, 4 Wash. C. C. 380; Matter of Jacobs, 98 N. Y. 98.” The term ‘liberty,’ as protected by the constitution, is not cramped into a mere freedom from physical restraint of the person of the citizen, as by incarceration, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by the Creator, subject only to such restraints as are necessary for the common welfare. In the language of Andrews, J., in Bertholf *v.* O’Reilly (74 N. Y. 515), the right to liberty embraces the right of man ‘to exercise his faculties and to follow the lawful avocations for the support of life,’ and as expressed by Earl, J., in In re Jacobs (98 N. Y. 98), ‘one may be deprived of his liberty, and his constitutional right thereto violated, without the actual restraint of his person. Liberty in its broad sense, as understood in this country, means the right not only of freedom from servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation.’ ” People *v.* Marx, 99 N. Y. 377, 386. “The evidence in favor of the petitioner is abundant and of the highest kind that the article he sells, forbidden by the Missouri statute, is wholesome. It is not so much urged that anything in the constitution of Missouri forbids or limits its power in this respect by express language, as that the

exercise of such a power in regard to a property shown to be entirely innocent, incapable of any injurious results or damage to the public health and safety, is an unwarranted invasion of public and private rights, an assumption of power without authority in the nature of our institutions, and an interference with the natural rights of the citizen and the public, which does not come within the province of legislation. The proposition has great force, and in the absence of any presentation of the motives and circumstances, which governed the legislature in enacting the law, we should have difficulty in saying it is unsound." Justice Miller, In re John Brosnahan, Jr., 4 McCrary, 1.

[1]See *ante,* § 26.

[2]See *ante,* § 1.

[1]Beebe *v.* State, 26 Ind. 501. See, also, City of Richmond *v.* Southern Bell Telephone & Telegraph Co., 85 Fed. 19; Dillon *v.* Erie Ry. Co., 19 Misc. Rep. 16; 43 N. Y. S. 320; Ex parte Whitwell, 98 Cal. 73. In City of Richmond *v.* Southern Bell Telephone & Tel. Co., *supra,* it is expressly declared that the courts must declare invalid all regulations, which promote no public good, but which to no public purpose oppress, control, and possibly defeat the existence of the business or the corporation which is thus subjected to police regulation. On the other hand, in Dillon *v.* Erie Ry. Co., *supra,* the mere fact, that a regulation so reduces the profits of a business as to amount to a confiscation, does not make the regulation unreasonable and unconstitutional, as long as the regulation relates to a business which is affected with a public interest, and it is necessary in order to promote that public interest.

[1]See Blair *v.* Kilpatrick, 40 Ind. 312; State *v.* Considine, 16 Wash. 358; Bergman *v.* Cleveland, 39 Ohio St. 651; in which it was held that the granting of liquor licenses to men only, did not violate the constitutional provisions against the granting of special privileges. But under the constitution of California, which provides that no person shall be disqualified by sex from pursuing any lawful vocation, it was held that a similar regulation, excluding females from employment in certain kinds of drinking saloons, was unconstitutional. Matter of Maguire, 57 Cal. 604 (40 Am. Rep. 125); In re Considine, 83 F. 157. But see Ex parte Felchin, 96 Cal. 360, in which it was held to be not unconstitutional, to exact a license fee of $30 per quarter of saloon keepers in general, and a fee of $150 where a female is employed as bartender, actress, dancer or singer. This was held to be no violation of the constitutional provision that "no person shall, on account of sex, be disqualified from entering upon or pursuing any lawful business, vocation or profession."

[1]Cooley Const. Law, p. 231. In Com. *v.* Hamilton Manfg. Co., 120 Mass. 383, it was held that a statute prohibiting the employment of all persons under eighteen, and of all women in laboring in any manufacturing establishment more than 60 hours per week (Mass. Stat. 1874), violates no contract implied in the granting of a charter to any manufacturing company, nor any right reserved under the constitution to any citizen, and may be maintained as a health or police regulation.

[1]People *v.* Ewer, 141 N. Y. 129.

[1]State *v.* Gardner, 58 Ohio St. 599.

[2]Cooley on Torts, pp. 289, 290.

[3]Napton, J., in Austin *v.* State, 10 Mo. 591.

[1]Bradwell *v.* State, 55 Ill. 535; *s. c.* 16 Wall. 130. In Ex parte Lockwood, 154 U. S. 116, it was held to be within the province of the courts of a State to determine whether they shall admit to practice at the local bar women who had been admitted to the bar of some other State, although the statute of the first State provided for the admission on motion of the lawyers of other States.

[2]"In the nature of things it is not every citizen of every age, sex, and condition that is qualified for every calling and position. It is the prerogative of the legislator to prescribe regulations founded upon nature, reason and experience for the due admission of qualified persons to professions and callings demanding special skill and confidence. This fairly belongs to the police power of the State; and in my opinion, in view of the peculiar characteristics, destiny and mission of woman, it is within the province of the legislature to ordain what offices, positions, and callings shall be filled and discharged by men, and shall receive the benefit of those energies and responsibilities, and that decision and firmness which are presumed to predominate in the sterner sex. For these reasons I think that the laws of Illinois now complained of are not obnoxious to the charge of abridging any of the privileges and immunities of citizens of the United States." Opinion of Justice Bradley, concurred in by JJ. Swayne and Field, in Bradwell *v.* Illinois, 16 Wall. 142.

[1]As to which see *post,* § 193.

[2]In In re Leach, 134 Ind. 665, the court held that women had a right to be admitted to the bar, although the constitution of the State declares that every person of good character, *being a voter,* shall be entitled to admission to the bar on prescribed conditions. In Ricker's Petition, 66 N. H. 207, the court held that membership of the bar and the right to practice the law is not a public office, so as to exclude women, under the common law rule, which denies to women the right of suffrage and public office. In Pennsylvania, the right of women to practice law is conceded. In re Kast's Case, 3 Pa. Dist. 302; 14 Pa. Co. Ct. 432; Richardson's Case, 3 Pa. Dist. 299. The position of the New Hampshire Court was taken in In re Thomas, 16 Colo. 441.

[1]The constitutionality of the regulations of the right to practice law has often been questioned. Thus a statute has been held to be unconstitutional which required attorneys to take an oath that they have not engaged in dueling, as a condition precedent to practicing law. Matter of Dorsey, 7 Port. (Ala.) 293. It had also been held to be unconstitutional for a statute to prohibit one from engaging in the practice of law who had served in the Confederate Army in the war of the rebellion, or to require them to take an oath that they have never taken up arms against the United States. Ex parte Tenney, 2 Duv. (Ky.) 351; Ex parte Law, 35 Ga. 285; Ex parte Garland, 4 Wall. 333; Cummings *v.* Missouri, 4 Wall. 277. But it is constitutional to require attorneys to take the oath of allegiance to the United States government. Cohen *v.* Wright, 22

Cal. 293; Ex parte Yale, 24 Cal. 241. And in order that he may be disbarred, precise and specific charges of malpractice or unprofessional behavior must be brought against him, and he must have an opportunity to be heard in his own defense. State *v.* Watkins, 3 Mo. 480; Matter of Mills, 1 Mich. 392; State *v.* Start, 7 Iowa, 499; Fisher's Case, 6 Leigh, 619; Withers *v.* State, 36 Ala. 252; Ex parte Percy, 36 N. Y. 651.

[1]By a Massachusetts law it was provided that no one can be permitted to recover by legal process the fees he has earned in the practice of medicine and surgery, unless he has been licensed by the Massachusetts Medical Society or was graduated as a doctor of medicine in Harvard University: the statute was held to be constitutional. Hewitt *v.* Charier, 16 Pick. 353. So, also, an act of Nevada, providing that graduation from a medical college was necessary to receive a license to practice medicine except in the case of those who have practiced for ten years in that State, was held to be not unconstitutional, because it does not make a similar exception in favor of those who had practiced for the same length of time elsewhere. Ex parte Spinney, 10 Nev. 323. See, also, to the same effect, People *v.* Hasbrouck (Utah), 39 P. 918; Gee Wo *v.* State, 36 Neb. 513; Driscoll *v.* Commonwealth, 93 Ky. 393; Williams *v.* People, 121 Ill. 84; Richardson *v.* State, 47 Ark. 562; State *v.* Randolph, 23 Oreg. 74. It seems as if the denial to those who were already engaged in the practice of medicine of the right to continue their practice, unless they procure a license, which is based upon an examination into their moral and professional fitness, would be unconstitutional, and an unlawful deprivation of one's personal liberty. Such, at least, seems to be the inference from Kohenstrat *v.* State, 4 Ohio N. P. 257; 6 Ohio Dec. 451; France *v.* State, 57 Ohio St. 1. But see State *v.* Call, 121 N. C. 643; State *v.* Corey, 4 Wash. St. 424; Iowa Eclectic Med. Col. *v.* Schrader, 87 Iowa. 659. It has been held to be constitutional to require examination into the moral character, as well as into the educational acquirements of an applicant for a certificate to practice medicine. State *v.* Hathaway, 115 Mo. 36; France *v.* State, 57 Ohio St. 1. On the power of the State in general to require an examination and a certificate or license, in order to practice medicine, see State *v.* Dent, 25 W. Va. 1; Wert *v.* Clutter, 37 Ohio St. 347; State *v.* State Board Medical Examiners, 32 Minn. 324; Great Western Ry. *v.* Bacon, 30 Ill. 353; Harbaugh *v.* City of Monmouth, 74 Ill. 367; Eastman *v.* State, 109 Ind. 278; Orr *v.* Meek, 111 Ind. 40; State *v.* Webster, 150 Ind. 607; In re Roe Chung (N. M.), 49 P. 952. In Kentucky, it is intimated that any discrimination against a particular school of medicine, in the recognition of their diplomas as a license to practice medicine, would be unconstitutioaal. Driscoll *v.* Commonwealth, 93 Ky. 393; Commonwealth *v.* Rice, 93 Ky. 393; Rice *v.* Commonwealth (Ky.), 20 S. W. 703. But in Iowa, it was held to be constitutional to require a State examination of all physicians whether they have been in practice, or what school of medicine they may represent. Iowa Eclectic Med. Col. *v.* Schrader, 87 Iowa, 659; Allopathic State Board of Medical Examiners *v.* Fowler, 50 La. Ann. 1358; State *v.* Calls, 121 N. C. 643; State *v.* Corey, 4 Wash. St. 424; State *v.* Webster, 150 Ind. 607. Osteopathy is so far recognized as a branch of medicine, as to require its practitioners to be licensed, before they can lawfully practice. Eastman *v.* People, 71 Ill. App. 236.

[1]Commonwealth *v.* Gibson, 7 Pa. Dist. Rep. 386; Knowles *v.* State, 87 Md. 204; Ferner *v.* State, 151 Ind. 247.

[2]State *v.* Forcier, 65 N. H. 42; Suffolk County *v.* Shaw, 47 N. Y. S. 349; 21 App. Div. 145; Com. *v.* Zacharias, 5 Pa. Dist. Rep. 475; State *v.* Heinemann, 80 Wis. 253; Luck *v.* Sears, 29 Oreg. 421; People *v.* Mohrman, 86 Mich. 434. In Luck *v.* Sears, the possesion of opium and other poisonous drugs by any one not a licensed pharmacist or physician is prohibited, unless such drug has been prescribed by a licensed physician or pharmacist. And, in People *v.* Mohrman, the regulations prohibit physicians from keeping "open shops for the retailing, disbursing or compounding of medicines and poisons," unless they comply with the requirements of the act for the licensing of druggists.

[3]State Ex rel. Graham *v.* McMahon, 65 Minn. 453. In this statute locomotive engineers and engines were expressly excepted from the operation of the statute. In Louisville & N. Ry. Co. *v.* Baldwin, 85 Ala. 619, a statute requiring all locomotive engineers and others in the employ of the railroads, who, in any capacity, are required to distinguish color signals, to submit to examination for color blindness, was held to be constitutional, except so far as the statute requires the railroads to pay the fees for the examinations.

[4]As to which, see post, Chapter X.

[5]People *v.* Warden City Prison, 144 N. Y. 529; affg. 81 Hun, 434; State *v.* Gardner, 58 Ohio St. 599. In the New York act, master and employing plumbers were alone required to be examined, and did not require journeymen plumbers to be examined. In State *v.* Gardner, *supra,* it is held that the Ohio law is not constitutionally objectionable because it requires only one member of a firm of plumbers to obtain a plumbers' license and to be registered. As to this last proposition see *contra,* State ex rel. Winkler *v.* Benzenberg, 101 Wis. 172.

[1]Cooley on Torts, p. 290; Cooley Const. Law, pp. 231, 232.

[1]Presby *v.* Klickitat County, 5 Wash. St. 329.

[2]See White *v.* Carroll, 42 N. Y. 161.

[3]Love *v.* Sheffelin, 7 Fla. 40; Massie *v.* Mann, 17 Iowa, 131; Miles *v.* Clarke, 4 Bosw. 632; Ryckman *v.* Coleman, 13 Abb. Pr. 398. But see Abbott *v.* Zeigler, 9 Ind. 511.

[1]"The statute requires the collection of statistics pertaining to the population of the State, and the health of the people, which may impart information useful in the enactment of laws, and valuable to science and the medical profession, to whom the people look for remedies for disease and for means tending to preserve health. The objects of the statute are within the authority of the State and may be attained in the exercise of its police power. Similar objects are contemplated by statutes requiring a census to be periodically taken, the constitutionality of which we have never heard questioned." Robinson *v.* Hamilton, 60 Iowa, 134 (46 Am. Rep. 63).

[1]Carthage *v.* Buckner, 4 Ill. App. 317.

[1]Patterson *v.* Kentucky, 97 U. S. 501. To the same effect, see Willis *v.* Standard Oil Co., 50 Minn. 290.

[2]But while statutory provisions for the inspection of fresh meat, for the purpose of preventing the sale of unwholesome and tainted meats, are constitutional, and do not violate any provision of the national or State constitutions, if they are reasonable, and have only the effect of condemning the sale of unwholesome meats; yet they must be of such a nature that they will not be an unconstitutional restraint upon interstate commerce. Thus, in Brimmer *v.* Rebman, 138 U. S. 78, the Virginia inspection law was held to be an unconstitutional interference with inter-State commerce, in that it required all fresh meats, which have been slaughtered 100 miles away from the place of sale, to be inspected by the local inspector, and the owner to pay a fee of one cent per pound for inspection. The Supreme Court held the fee to be excessive, and to make the act tantamount to the prohibition of wholesome meat, which had not been slaughtered within a radius of 100 miles of the place of sale. The same conclusion was reached in State *v.* Klein, 126 Ind. 68, and Hoffman *v.* Harvey, 128 Ind. 600, as to the unconstitutionality of the Indiana inspection law, so far as it required the examination of the animal before slaughtering and within the State. It was held to be a prohibition of the sale of meats dressed outside of the State. See, also, to the same effect, as to the unconstitutionality of similar provisions of the Minnesota law: Minnesota *v.* Barber, 136 U. S. 313; In re Barber, 39 Fed. 641; Swift *v.* Sutphin, 39 Fed. 630. But reasonable inspection laws are constitutional. State *v.* People's Slaughterhouse, etc., Co., 46 La. Ann. 1031. Thus, it has been held to be constitutional for a State to provide by statute regulations for the control, supervision and inspection of stockyards, for the preservation of the public health, not only of the vicinity, but, likewise, of the consumers of meat in general. Cotting *v.* Kansas City Stockyards Co., 79 Fed. 679; Higginson *v.* Kansas City Stockyards Co., 79 Fed. 679.

[1]State *v.* Campbell, 64 N. H. 402. The New York statute was held to be unobjectionable, although it provided that the chemical analysis of the milk shall be taken as conclusive evidence that the milk has been adulterated, which can be contradicted only by an opposing chemical analysis of the same stock of milk. People *v.* Cipperly, 101 N. Y. 634; People *v.* Eddy, 59 Hun, 615. And the general requirement that milk vendors shall, upon the demand of a health inspector, furnish him with a sample of the milk offered for sale without the receipt of payment therefor, has been sustained as a constitutional exercise of police power. State *v.* Dupaquier, 46 La. Ann. 577. In this case the amount which might be demanded by the inspector for inspection and analysis was limited to a one-half pint.

[2]Patapsco Guano Co. *v.* Bd. of Agriculture of N. C., 52 Fed. 690; Steiner *v.* Ray, 84 Ala. 93; Vanmeter *v.* Spurrier, 94 Ky. 22.

[3]In People *v.* Girard, 145 N. Y. 105, Judge Finch says, in reply to the argument that the law in question was an interference with a vested right: "Sometimes it (this argument) is pertinent and weighty, but in this case it is neither. It becomes the assertion of a vested right to color a food product so as to conceal or disguise its true or natural appearance; in plain words, a vested right to deceive the public." In the same case it was expressly declared that proof of the innocuous character of the

coloring matter was not sufficient to establish the claim that the law was an unconstitutional exercise of police power. People *v.* Girard, 73 Hun, 457. The same position has been taken in the case of Weller *v.* State, 53 Ohio St. 77, in respect to the constitutionality of a similar statute. The court say, *inter alia:* "Much is claimed from the fact that it was admitted on the trial that the vinegar of the defendant was wholesome, and that it did not intend to deceive any one by using the roasted malt (as coloring matter) and labeling and selling his product as 'malt vinegar.' But this is wholly immaterial. It matters not what his intentions may have been. The tendency of such devices is to deceive the public, and the statute was enacted to afford it protection therefrom. Such a statute is clearly within the proper exercise of the police power of the State." In the Ohio case it was claimed that the only purpose of the coloring matter, in itself harmless, was to give the product a pleasing color and aroma. And in the New York case it was stated that the coloring need not have been used for the purpose of making it resemble some other kind of vinegar or other product, in order that the act may be held to be constitutional. See, also, to the same effect, Williams *v.* McNeal, 7 Ohio C. C. 280.

[1]See *post,* § 122.

[1]Armour Packing Co. *v.* Snyder, 84 Fed. 136; State *v.* Marshall, 64 N. H. 549; State ex rel. Weideman *v.* Horgan, 55 Minn. 183.

[2]People *v.* Arensberg, 105 N. Y. 123; People *v.* Briggs, 114 N. Y. 56; State *v.* Newton (N. J.), 14 Atl. 664; State *v.* Bockstruck, 136 Mo. 335. In the light of the cases on the prohibition of the use of coloring matter in the manufacture of vinegar, *supra,* it would be reasonable to affirm that a law would be constitutional, which prohibited the use of coloring matter in the manufacture of butter, so that all butter shall have the pale color of so-called country butter. In a recent case in New Jersey, Ammon *v.* Newton, 50 N. J. L. 543, it was held that a statute, which made it an offense for any one to have in his possession for the purpose of sale "oleomargarine that is colored, stained or mixed with annotto or any other coloring matter or substance," did not prohibit the use of cotton seed oil in the manufacture of olemargarine, as that was a nutritious vegetable compound, and it was used not only for the purpuse of giving color to the product, but it likewise constituted one of its substantial ingredients. In the application of the rule *noscitur a sociis,* the court held the language of the New Jersey statute, "or any other coloring matter or substance," to apply to and include only those things which may be employed in the manufacture of oleomargarine for the purpose of so coloring the product as to resemble butter, and to enable it to be fraudulently sold as butter. The court say: "The language cannot, with propriety, be interpreted so as to include (within its prohibition) materials employed chiefly to make up the substance of the compound, and which imparts some color only as a necessary incident of their use."

[1]In New Jersey, the State law was sustained as constitutional, which required the dealers in the product, to furnish each purchaser of oleomargarine with a card or printed notice, with letters of a prescribed size, on which it is stated that it is oleomargarine which the purchaser is buying, and the name and address of the dealer are given. Bayles *v.* Newton, 50 N. J. L. 549. And in Massachusetts, a law was

sustained, which required the vendors of oleomargarine to deliver the package in a wagon, containing on both sides a large sign, announcing: "Licensed to sell oleomargarine." Commonwealth *v.* Crane, 158 Mass. 218. In Maryland the packages of oleomargine are required to be stamped with the name. Pierce *v.* State, 68 Md. 592.

[2]State *v.* Aslesen, 50 Minn. 5; State *v.* Bassett, 50 Minn. 5; State *v.* Snow, 81 Iowa, 642.

[1]As to the meaning of "original packages" see *post,* § 220.

[2]In re Ware, 53 Fed. 783.

[3]People *v.* Gillson, 109 N. Y. 389.

[4]People *v.* Webster, 17 Misc. Rep. (N. Y.) 410; 40 N. Y. S. 1135.

[1]People *v.* Cannon, 63 Hun, 306; *s. c.* 139 N. Y. 32; People *v.* Quinn, 139 N. Y. 32; People *v.* Bartholf, 139 N. Y. 32. A similar regulation has been sustained in regard to the sale by another of milk or cream cans, which are stamped with the name or initials of a dealer in those dairy products. Bell *v.* Gaynor, 14 Misc. Rep. (N. Y.) 334; 36 N. Y. S. 122.

[1]Schmalz *v.* Woolley, 56 N. J. Eq. 649.

[2]Perkins *v.* Heert, 5 App. Div. (N. Y.) 335; Cohn *v.* People, 149 III. 486; State *v.* Bishop, 128 Mo. 373.

[3]People *v.* Hawkins, 10 Misc. Rep. (N. Y.) 65; 31 N. Y. S. 115, where the law was attempted to be enforced against goods already manufactured by convicts.

[4]People *v.* Hawkins, 47 N. Y. S. 56; 20 App. Div. 494.

[1]In re Mosler 8 Ohio C. C. 324.

[2]Weil *v.* State, 3 Ohio, C. C. 657.

[3]Hine *v.* Roberts, 48 Conn. 267; Mott *v.* Havana Nat. Bank, 22 Hun, 354; Guilford *v.* McKinley, 61 Ga. 230; Ketchum *v.* Brennan, 53 Miss. 596; Preston *v.* Whitney, 23 Mich. 260; Johnson *v.* Whiteemore, 27 Mich. 463; Third Nat. Bank *v.* Armstrong, 25 Minn. 530; Minneapolis &c. Co. *v.* Hally, 27 Minn. 495.

[1]Glover *v.* Board of Flour Inspectors, 48 Fed. 348.

[2]Turner *v.* Maryland, 107 U. S. 38 (22 Am. Law Reg. (n. s.) 198, note).

[3]Ritchie *v.* Boynton, 114 Mass. 431; Eaton *v.* Keegan, 114 Mass. 433; Durgin *v.* Dyer, 68 Me. 143; Woods *v.* Armstrong, 34 Ala. 150.

[4]Mobile *v.* Tuille, 3 Ala. (n. s.) 140.

[5]Pierce *v.* Kimball, 9 Me. 54 (23 Am. Dec. 537).

[6]City Council *v.* Rogers, 2 McCord, 495; State *v.* Pittsburgh & S. Coal Co., 41 La. Ann. 465; Pittsburgh & S. Coal Co. *v.* Louisiana, 156 U. S. 590.

[7]See Eaton *v.* Keegan, 114 Mass. 433.

[1]Stokes *v.* New York, 14 Wend. 87; Yates *v.* Milwaukee, 12 Wis. 673.

[2]See *supra,* same section, for a fuller discussion of these laws.

[3]Missouri regulation of the sale of opium; held, to be constitutional. State *v.* Lee, 137 Mo. 143.

[1]See *ante,* § 10.

[2]On the other hand it has been held to be unconstitutional to require druggists to furnish the names of parties to whom he sells liquor. Clinton *v.* Phillips, 58 Ill. 102 (11 Am. Rep. 52).

[3]In the Ohio statute, partnerships transacting business under a fictitious name were required to file with the clerk of court of common pleas a certificate giving the names in full of all the partners, before they are entitled to maintain an action on any partnership transaction or contract. The act was held to be constitutional. Hartzell *v.* Warren, 11 Ohio C. C. 269; *s. c.* 10 C. D. 183.

[1]Blaker *v.* Hood, 53 Kan. 499. In that case the law was enforced against a private banker.

[2]Meadowcroft *v.* People, 163 Ill. 56.

[1]Commonwealth *v.* Vrooman, 164 Pa. St. 306. See *post,* § 105, for a fuller discussion of the constitutionality of this law.

[2]See U. S. Const., art. I., § 8, in which it is provided that Congress shall have power "to coin money, regulate the value thereof, and of foreign coin."

[1]See art. I., § 10.

[2]Cong. Globe, 1861-2, Part I., 764.

[1]Hepburn *v.* Griswold, 8 Wall. 603.

[2]12 Wall. 457.

[3]Juillard *v.* Greenman, 110 U. S. 421.

[4]"By the Constitution of the United States, the several States are prohibited from coining money, emitting bills of credit, or making anything but gold and silver coin a

tender in payment of debts. But no intention can be inferred from this to deny to Congress either of these powers. Most of the powers granted to Congress are described in the eighth section of the first article; the limitations intended to be set to its powers, so as to exclude certain things which might be taken to be included in the ninth section; the tenth section is addressed to the States only. This section prohibits the States from doing some things which the United States are expressly prohibited from doing, as well as from doing some things the United States are expressly authorized to do, and from doing some things neither expressly granted nor expressly denied to the United States. Congress and the States equally are expressly prohibited from passing any bill of attainder, or *ex post facto* law, or granting any title of nobility. The States are forbidden, while the President and Senate are expressly authorized, to make treaties. The States are forbidden, but Congress is expressly authorized, to coin money. The States are prohibited from emitting bills of credit; but Congress, which is neither expressly authorized nor expressly forbidden to do so, has, as we have already seen, been held to have the power of emitting bills of credit, and of making every provision for their circulation as currency, short of giving them the quality of legal tender for private debts—even by those who have denied its authority to give them this quality.

"It appears to us to follow, as a logical and necessary consequence, that Congress has the power to issue the obligations of the United States in such form, and to impress upon them such qualities as currency for the purchase of merchandise, and the payment of debts, as accords with the usage of sovereign governments. The power, as incident to the power of borrowing money and issuing bills or notes of the government for money borrowed, of impressing upon those bills or notes the quality of being a legal tender for the payment of private debts, was a power universally understood to belong to sovereignty, in Europe and America, at the time of the framing and adoption of the constitution of the United States. The governments of Europe, acting through the monarch or the legislature, according to the distribution of powers under their respective constitutions, had and have as sovereign a power of issuing paper money as of stamping coin. * * * The power of issuing bills of credit, and making them, at the discretion of the legislature, a tender in payment of private debts, had long been exercised in this country by the several colonies and States; and during the Revolutionary war the States upon the recommendation of the congress of the confederation had made the bills issued by Congress a legal tender. See Craig *v.* Missouri, 4 Pet. 35, 453; Briscoe *v.* Bank of Kentucky, 11 Pet. 257, 313, 334, 336; Legal Tender Cases, 12 Wall. 557, 558, 622. The exercise of this power not being prohibited to Congress by the constitution, it is included in the power expressly granted to borrow money on the credit of the United States.

"This position is fortified by the fact that Congress is vested with the exclusive exercise of the analogous power of coining money, and regulating the value of domestic and foreign coin, and also with the paramount power of regulating foreign and interstate commerce. Under the power to borrow money on the credit of the United States, and to issue circulating notes for the money borrowed, its power to define the quality and force of those notes as currency is as broad as the like power over a metallic currency under the power to coin money and to regulate the value thereof. Under the two powers, taken together, Congress is authorized to establish a

national currency, either in coin or in paper, and to make that currency lawful money for all purposes, as regards the national government or private individuals.

"The power of making the notes of the United States a legal tender in payment of private debts, being included in the power to borrow money and to provide a national currency, is not defeated or restricted by the fact that its exercise may affect the value of private contracts. If, upon a just and fair interpretation of the whole constitution, a particular power or authority appears to be vested in Congress, it is no constitutional objection to its existence, or to its exercise, that the property or the contracts of individuals may be incidentally affected." * * * "So, under the power to coin money and to regulate its value, Congress may (as it did with regard to gold by the act of June 28, 1834, ch. 95, and with regard to silver by act of Feb. 28, 1878, ch. 20), issue coins of the same denomination as those already current by law, but of less intrinsic value than those, by reason of containing a less weight of the precious metals, and thereby enable debtors to discharge their debts by the payment of coins of less than the real value. A contract to pay a certain sum in money without any stipulation as to the kind of money in which it shall be paid, may always be satisfied by payment of that sum in any currency which is lawful money at the place and time at which payment is to be made. 1 Hale P. C. 192, 194; Bac. Abr. Tender, B. 2; Pothier, Contract of Sale, No. 416; Pardessus, Droit Commercial, No. 204, 205; Searight *v.* Calbraith, 4 Dall. 324. As observed by Mr. Justice Strong in delivering the opinion of the court in the *Legal Tender Cases,* 'every contract for the payment of money, simply, is necessarily subject to the constitutional power of the government over the currency, whatever that power may be, and the obligation of the parties is, therefore, assumed with reference to that power.'

"Congress, as the legislature of a sovereign nation, being expressly empowered by the Constitution 'to lay and collect taxes, to pay the debts and provide for the common defense and general welfare of the United States,' and 'to borrow money on the credit of the United States,' and 'to coin money and regulate the value thereof and of foreign coin;' and being clearly authorized, as incidental to the exercise of those great powers, to emit bills of credit, to charter national banks, and to provide a national currency for the whole people, in the form of coin, treasury notes and national bank bills; and the power to make the notes of the government a legal tender in payment of private debts being one of the powers belonging to sovereignty in other civilized nations, and not expressly withheld from Congress by the constitution; we are irresistibly impelled to the conclusion that the impressing upon the treasury notes of the United States the quality of being a legal tender in payment of private debts is an appropriate means, conducive and plainly adapted to the execution of the undoubted powers of Congress, consistent with the letter and spirit of the constitution, and, therefore, within the meaning of that instrument, 'necessary and proper for carrying into execution the powers vested by this constitution in the government of the United States.'

"Such being our conclusion in matter of law, the question whether at any particular time, in war or in peace, the exigency is such, by reason of unusual and pressing demands on the resources of the government, or of the inadequacy of the supply of gold and silver coin, to furnish the currency needed for the uses of the government and of the people, that it is, as matter of fact, wise and expedient to resort to this

measure is a political question, to be determined by Congress when the question of exigency arises, and not a judicial question, to be afterwards passed upon by the courts." Opinion of court by J. Gray, in Juillard *v.* Greenman, 110 U. S. 421.

"It must be evident, however, upon reflection, that if there were any power in the government of the United States to impart the quality of legal tender to its promissory notes, it was for Congress to determine when the necessity for its exercise existed; that war merely increased the urgency for money; it did not add to the powers of the government nor change their nature; that if the power exists it might be equally exercised when a loan was made to meet ordinary expenses in time of peace, as when vast sums were needed to support an army or navy in time of war. The wants of the government could never be the measure of its powers. But in the excitement and apprehensions of the war these considerations were unheeded; the measure was passed as one of overruling necessity in a perilous crisis of the country. Now, it is no longer advocated as one of necessity, but as one that may be adopted at any time. Never before was it contended by any jurist or commentator on the constitution that the government, in full receipt of ample income, with a treasury overflowing, with more money on hand than it knows what to do with, could issue paper money as a legal tender. What was in 1862 called 'the medicine of the constitution' [by Sumner], has now become its daily bread. So it always happens that whenever a wrong principle of conduct, political or personal, is adopted on the plea of necessity, it will afterwards be followed on a plea of convenience.

"The advocates of the measure have not been consistent in the designation of the power upon which they have supported its validity, some placing it on the power to borrow money, some on the coining power; and some have claimed it as an incident to the general powers of the government. In the present case it is placed by the court upon the power to borrow money, and the alleged sovereignty of the United States over the currency. It is assumed that this power, when exercised by the government, is something different from what it is when exercised by corporations or individuals, and that the government has, by the legal tender provision, the power to enforce loans of money because the sovereign governments of European countries have claimed and exercised such power.

* * * "As to the terms *to borrow money,* where, I would ask, does the court find any authority for giving to them a different interpretation in the constitution from what they receive, when used in other instruments, as in the charters of municipal bodies or of private corporations, or in the contracts of individuals? They are not ambiguous; they have a well-settled meaning in other instruments. If the courts may change that in the constitution, so it may the meaning of all other clauses; and the powers which the government may exercise will be found declared, not by plain words in the organic law, but by words of a new significance resting in the minds of the judges. Until some authority beyond the alleged claim and practice of the sovereign governments of Europe be produced, I must believe that the terms have the same meaning in all instruments wherever they are used; that they mean a power only to contract for a loan of money, upon considerations to be agreed upon between the parties. The conditions of the loan, or whether any particular security shall be given to the lenders, are matters of arrangement between the parties, they do not concern any one else.

They do not imply that the borrower can give to his promise to refund the money, any security to the lender outside of the property or rights which he possesses. The transaction is completed when the lender parts with his money, and the borrower gives his promise to pay at the time and in the manner and with the securities agreed upon. Whatever stipulations may be made to add to the value of the promises or to secure its fulfillment, must necessarily be limited to the property rights and privileges which the borrower possesses, whether he can add to his promises any element which will induce others to receive them beyond the security which he gives for their payment, depends upon his promise to control such element. If he has a right to put a limitation upon the use of other persons' property, or to enforce an exaction of some benefit from them, he may give such privilege to the lender; but if he has no right thus to interfere with the property or possessions of others, of course he can give none. It will hardly be pretended that the government of the United States has any power to enter into any engagement that, as security for its notes, the lender shall have special privileges with respect to the visible property of others, shall be able to occupy a portion of their lands or their houses, and thus interfere with the possession and use of their property. If the government cannot do that, how can it step in and say, as a condition of loaning money, that the lender shall have a right to interfere with contracts between private parties? A large proportion of the property of the world exists in contracts and the government has no more right to deprive one of their value by legislation operating directly upon them than it has a right to deprive one of the value of any visible and taxable property.

"No one, I think, will pretend that individuals or corporations possess the power to impart to their evidences of indebtedness any quality by which the holder will be able to affect the contracts of other parties, strangers to the loan; nor would any one pretend that Congress possesses the power to impart any one quality to the notes of the United States, except from the clause authorizing it to make laws necessary and proper to the execution of its powers. That clause, however, does not enlarge the expressly designated powers; it merely states what Congress could have done without its insertion in the constitution. Without it Congress could have adopted any appropriate means to borrow; but that can only be appropriate for that purpose which has some relation of fitness to the end, which has respect to the terms essential to the contract, or to the securities which the borrower may furnish for the repayment of the loan. The quality of legal tender does not touch the terms of the contract; that is complete without it; nor does it stand as a security for the loan, for a security is a thing pledged over which the borrower has some control, or in which he holds some interest.

"The argument presented by the advocates of legal tender is, in substance this: The object of borrowing is to raise funds, the addition of the quality of legal tender to the notes of the government will induce parties to take them, and funds will thereby be more readily loaned. But the same thing may be said of the addition of any other quality which would give to the holder of the notes some advantage over the property of others, as, for instance, that the notes should serve as a pass on the public conveyances of the country, or as a ticket to places of amusement, or should exempt his property from State and municipal taxation or entitle him to the free use of the telegraph lines, or to a percentage from the revenues of private corporations. The

same consequence, a ready acceptance of the notes, would follow; and yet no one would pretend that the addition of privileges of this kind with respect to the property of others, over which the borrower has no control, would be in any sense an appropriate measure to the execution of the power to borrow.

"* * * The power vested in Congress to coin money does not in my judgment fortify the position of the court as its opinion affirms. So far from deducing from that power any authority to impress the notes of the government with the quality of legal tender, its existence seems to me inconsistent with a power to make anything but coin a legal tender. The meaning of the terms 'to coin money' is not at all doubtful. It is to mould metallic substance into forms convenient for circulation and to stamp them with the impress of government authority indicating their value with reference to the unit of value established by law. Coins are pieces of metal of definite weight and value, stamped such by the authority of the government.

"* * * The clause to coin money must be read in connection with the prohibition upon the States to make anything but gold and silver coin a tender in payment of debts. The two taken together clearly show that the coins to be fabricated under the authority of the general government, and as such to be a legal tender for debts, are to be composed principally, if not entirely, of the metals of gold and silver. Coins of such metals are necessarily a legal tender to the amount of their respective values without any legislative enactment, and the statutes of the United States providing that they shall be such tender is only declaratory of their effect when offered in payment. When the constitution says, therefore, that Congress shall have the power to coin money, interpreting that clause with the prohibition upon the States, it says it shall have the 'power to make coins of the precious metals a legal tender, for that alone which is money can be a legal tender. If this be the true import of the language, nothing else can be made a legal tender. We all know that the value of the notes of the government in the market, and in the commercial world generally, depends upon their convertibility on demand into coin; and as confidence in such convertibility increases or diminishes, so does the exchangeable value of the notes vary. So far from becoming themselves standard of value by reason of the legislative declaration to that effect, their own value is measured by the facility with which they can be exchanged into that which alone is regarded as money by the commercial world. They are promises of money, but they are not money in the sense of the constitution. * * * Now, to coin money is, as I have said, to make coins out of metallic substances, and the only money the value of which Congress can regulate is coined money, either of our mints or of foreign countries. It should seem, therefore, that to borrow money is to obtain a loan of coined money, that is, money composed of precious metals, representing value in the purchase of property and payment of debts.' " Dissenting opinion of J. Field in Juillard *v.* Greenman, *supra.*

[1]See *post,* § 215.

[1]110 U. S. 449.

[1]Dissenting opinion of Justice Field in Juillard *v.* Greenman, 110 U. S. 465.

[1]See Ogden *v.* Saunders, 12 Wheat. 269.

[1]12 Wall. 457.

[1]110 U. S. 444.

[1]110 U. S. 421.

[1]110 U. S. 421.

[2]2 Cranch, 29.

[1]2 Cranch, 29.

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[2]See among other cases, the Confederate Note Cases, 19 Wall. 548; Stewart *v.* Salmon, 94 U. S. 434; Cook *v.* Lillo, 103 U. S. 793; Wilmington, etc., R. R. Co. *v.* King, 91 U. S. 3.

[1]See *post,* Chapter XVI.

[2]U. S. Cons., art. I., § 10.

[3]U. S. Const. Amend., art. 5. The platform of the Democratic National Convention of 1892 contains a similar declaration as to the constitutionality of a tariff law for protection.

[1]Commonwealth *v.* Perry, 155 Mass. 127. See, also, State *v.* Stewart, 59 Vt. 273; State *v.* Goodwill, 13 W. Va. 179; Leep *v.* St. Louis I. M. & S. Ry., 58 Ark. 407.

[1]Cooley on Torts, p. 278.

[1]See *post,* §§ 208-214.

[2]See *post,* § 127.

[1]Munn *v.* Illinois, 94 U. S. 113.

[2]pp. 125, 126.

[1]"In this connection it must also be borne in mind that, although in 1874, there were in Chicago fourteen warehouses adapted to this particular business, and owned by about thirty persons, nine business firms controlled them, and that the prices charged and received for storage were such as have been from year to year agreed upon and established by the different elevators or warehouses in the city of Chicago, and which rates have been annually published in one or more newspapers printed in said city, in the month of January in each year, as the established rates for the year then next ensuing such publication. Thus it is apparent that all the elevating facilities through

which these vast productions of seven or eight great States of the West must pass on the way to four or five of the States on the seashore may be a 'virtual' monopoly.

"Under such circumstances it is difficult to see why, if the common carrier, or the miller, or the ferryman, or the innkeeper, or the wharfman, or the baker, or the cartman, or the hackney coachman, pursues a public employment and exercises 'a sort of public office,' these plaintiffs in error do not. They stand, to use again the language of their counsel, in the very 'gateway of commerce,' and take toll from all who pass. Their business most certainly 'tends to a common charge, and is become a thing of public interest and use.' * * * Certainly, if any business can be clothed 'with a public interest, and cease to be *juris privati* only, this has been." Opinion of Waite, Ch. J., *supra.* See *post,* § 93, for extracts from the dissenting opinion of Justice Field.

[1]See *post,* § 96, for lengthy quotations from Lord Hale.

[2]See Civil Rights Cases, 109 U. S. 3.

[1]Munn *v.* Illinois, *supra.*

[2]Donnell *v.* State, 48 Miss. 661; People *v.* King, 110 N. Y. 418; Bryan *v.* Adler, 97 Wis. 124.

[1]Cooley on Torts, p. 285. See *post,* § 101, concerning licenses as police regulations.

[2]In re Chung Fat, 96 Fed. 202.

[1]Chicago, etc., R. R. Co. *v.* Iowa, 94 U. S. 155; Peik *v.* Chicago, etc., R. R. Co., 94 U. S. 164; Ames *v.* Un. Pac. Ry., 64 Fed. 165; Chicago, M. & St. P. Ry. Co. *v.* Becher, 32 Fed. 849; Smith *v.* Lake Shore & M. S. Ry. Co., 114 Mich. 460; Slaughterhouse Cases, 116 Wall. 36; Waterworks *v.* Schotler, 110 U. S. 347. Judge Cooley classifies the cases as follows:—

"1. Where the business is one, the following of which is not a matter of right, but is permitted by the State as a matter of privilege or franchise. Under this head may be classed the business of setting up lotteries, of giving shows, and of keeping billiard-tables for hire; of selling intoxicating drinks, and of keeping a ferry or toll bridge.

"2. When the State on public grounds renders to the business special assistance by taxation, or under the eminent domain, as is done in the case of railroads.

"3. When for the accommodation of the business special privileges are given in the public streets, or exceptional use allowed of public property or public easements, as in the case of hackmen, draymen, etc. Commonwealth *v.* Gage, 114 Mass. 328.

"4. When exclusive privileges are granted in consideration of some special return to the public and in order to secure something to the public not otherwise attainable." Cooley's Principles of Constitution, p. 234. See *post,* § 212, on the regulation of railroad rates of charges.

[1]See *post,* § 102.

[2]Munn *v.* People, 69 Ill. 80; *s. c.* 94 U. S. 113.

[3]1 Harg. Law Tracts, 78.

[1]Munn *v.* Illinois, 94 U. S. 125, 126.

[2]In the case in question, the use of the Chicago elevator was necessary to all dealers in grain in that city, and was controlled by nine firms, who annually established rates of charges for the regulation of the business. Says Chief Justice Waite: "Thus it is apparent that all the elevating facilities through which these vast productions 'of seven or eight great States of the West' must pass on the way 'to four or five of the States on the seashore' may be a virtual monopoly." p. 131.

[3]"The public has no greater interest in the use of buildings for the storage of grain than it has in the use of buildings for the residences of families, nor, indeed, anything like so great an interest; and, according to the doctrine announced, the legislature may fix the rent of all tenements used for residences, without reference to the cost of their erection. If the owner does not like the rates prescribed, he may cease renting his houses. He has granted to the public, says the court, an interest in the use of the buildings, and 'he may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.' The public is interested in the manufacture of cotton, woolen and silken fabrics, in the construction of machinery, in the printing and publication of books and periodicals, and in the making of utensils of every variety, useful and ornamental; indeed, there is hardly an enterprise or business engaging the attention and labor of any considerable portion of the community, in which the public has not an interest in the sense in which that term is used by the court in its opinion; and the doctrine which allows the legislature to interfere with and regulate the charges which the owners of property thus employed shall make for its use, that is, the rates at which all these different kinds of business shall be carried on, has never before been asserted, so far as I am aware, by any judicial tribune in the United States." Dissenting opinion of Justice Field in Munn *v.* Illinois, 94 U. S. 136.

[1]Mayor *v.* Yuille, 3 Ala. 137 (36 Am. Dec. 441). See Page *v.* Fazackerly, 36 Barb. 392; Guillotte *v.* New Orleans, 12 La. Ann. 432.

[1]De Portibus Maris, 1 Harg. Law Tracts, 78.

[1]See In re Annan, 50 Hun, 413; People *v.* Budd, 117 N. Y. 1 (see Justice Peckham's dissenting opinion to the contrary, and approving of the position taken in the text of the preceding section); Budd *v.* People, 143 U. S. 517; Peeple *v.* Walsh, 143 U. S. 517; Brass *v.* State of North Dakota, 153 U. S. 391 (see dissenting opinions); State *v.* Brass, 2 N. D. 482; Cotting *v.* Kansas City Stock Yards Co., 79 Fed. 679 (principle applied to stock yards); Higginson *v.* Kansas City Stock Yards Co., 79 Fed. 679. In Frisbie *v.* United States, 157 U. S. 160, an act of Congress was sustained, which prohibited pension agents and attorneys from charging more than ten dollars for their services in procuring a pension.

[2]Munn *v.* Illinois, 94 U. S. 136.

[1]See Dillon *v.* Erie Ry. Co., 19 Misc. Rep. 116; 43 N. Y. S. 320.

[2]Smyth *v.* Ames, 169 U. S. 466; Smyth *v.* Higginson, 169 U. S. 466. See other cases in support of this rule of limitation. Clyde *v.* Richmond & D. Ry. Co., 57 Fed. 436; Huidekoper *v.* Duncan, 57 Fed. 436; City of Richmond *v.* So. Bell Telephone & Telegraph Co., 85 Fed. 19; Covington & L. Turnpike Co. *v.* Sandford, 164 U. S. 578; Mercantile Trust Co. *v.* Texas & Pac. Ry. Co., 51 Fed. 529; Same *v.* St. Louis S. W. Ry. Co. of Texas, *Id.;* Same *v.* Tyler S. E. Ry. Co. of Texas, *Id.;* Farmers' Loan & Trust Co. *v.* Gulf, C. & S. F. Ry. Co., *Id.;* Same *v.* International & G. N. R. Co., *Id.;* Cotting *v.* Kansas City Stock Yards Co., 79 Fed. 679; Higginson *v.* Kansas City Stock Yards Co., 79 Fed. 679; Milwaukee Electric Ry. & Light Co. *v.* City of Milwaukee, 87 Fed. 577; Central Trust Co. of New York *v.* City of Milwaukee, 87 Fed. 577; Beardsley *v.* N. Y., Lake Erie & W. Ry. Co., 17 Misc. Rep. (N. Y.) 256; 40 N. Y. S. 1077; San Diego Water Co. *v.* City of San Diego, 118 Cal. 556; San Joaquin & King's River Canal & Irrigation Co. *v.* Stanislaus County, 90 Fed. 516. In Smyth *v.* Ames, 169 U. S. 466, the opinion filed in the prior hearing was qualified by the statement of the court that the decision went no farther than to pronounce the rates of the Nebraska statute to be unreasonably low as an entirety, and that it is not to be construed as forbidding the State Commission to reduce rates on specific articles below the rates which were being charged when the decision was rendered.

[1]Chicago B. & Q. Ry. Co. *v.* Jones, 149 Ill. 361.

[1]See Tiedeman's Unwritten Constitution of the United States, p. 54 *et seq.,* and *post,* Chapter XV.

[2]Railway Co *v.* Smith, 128 U. S. 174; Chicago & Grand Trunk Ry. Co. *v.* Wellman, 143 U. S. 339; Regan *v.* Trust Co., 154 U. S. 362.

[3]Central Trust Co. *v.* Citizens' Street Ry. Co., 82 Fed. 1. See City of Indianapolis *v.* Navin, 151 Ind. 139, in which the Supreme Court of Indiana held that the express stipulation in the general law of incorporation of the right of street railways to fix their rates of fare did not prevent the subsequent reduction and regulation of rates of fare by a general law, even though that law was not enacted as an amendment of the charter. In the case, *supra,* of Central Trust Co. *v.* Citizens' Street Ry. Co., the same regulation of the rates of fare of the Indianapolis street railways was held to be unconstitutional, in that the regulation was not an amendment to the charter, and that to be such an amendment, it would have to be made to apply to all street railways which had been incorporated under the general law of incorporation, which contained the stipulation that the railways shall have the right to fix their rates of fare.

[4]Louisville & T. Turnpike Co. *v.* Boss (Ky.), 44 S. W. 981.

[1]See Munn *v.* Illinois, 94 U. S. 113, and other cases, fully explained in §§ 96, 97.

[2]This was the conclusion of the Ohio court, in regard to a city ordinance, which provided that all specifications for public work shall require the contractor to pay all

common laborers on such work not less than $1.50 per day. State *v.* Norton, 5 Ohio N. P. 183.

[1]In Millett *v.* People, 117 Ill. 294, and Harding *v.* People, 160 Ill. 459, it was held that the State had no right to require the quantity of coal mined to be ascertained by weighing, in determining the wages earned by the miner; and that the parties could agree upon some other method of determining the quantity of coal. See Whitebreast Fuel Co. *v.* People, 175 Ill. 51, in which a statutory regulation was sustained, which required mine owners to pay the miners for all coal mined, including egg, nut, pea, and slack, and such other grades into which coal may be divided, at such prices as may be agreed upon between the parties. In Ramsey *v.* People, 142 Ill. 380; Commonwealth *v.* Brown, 8 Pa. Super. Ct. 339; 43 W. N. C. 39, and In re House Bill No. 203, 21 Colo. 27, the requirement, that the coal be weighed before it was screened, was held to be constitutional.

[1]See Orient Ins. Co. *v.* Daggs, 172 U. S. 575; aff'g *s. c.* 136 Mo. 382, in which this conception of what constitutes special legislation in the constitutional sense, is reaffirmed, in holding that a State regulation of the business of fire insurance is unconstitutional, on account of being special legislation, because it refers only to the business of fire insurance.

[2]Peel Splint Coal Co. *v.* State, 36 W. Va. 802. See to the same general effect, in favor of the constitutionality of these laws, Wilson *v.* State, (Kans, App.) 53 P. 371.

[1]Miller *v.* C. B. & Q. R. R. Co., 65 Fed. 305; Chicago B. & Q. Ry. Co. *v.* Wymore, 40 Neb. 645; Chicago B. & Q. Ry. Co. *v.* Bell, 44 Neb. 44.

[2]Lease *v.* Penn. Ry. Co., 10 Ind. App. 47; Johnson *v.* Philadelphia & Reading Ry. Co., 163 Pa. St. 127; Ringle *v.* Penn. Ry. Co., 164 Pa. St. 529; Balt. & Ohio R. R. Co. *v.* Bryant, 9 Ohio C. C. 332, and cases cited in preceding note.

[3]Pittsburgh, C. C. & St. L. Ry. Co. *v.* Montgomery, 152 Ind. 1; Pittsburgh, C. C. & St. L. Ry. Co. *v.* Hosea, 152 Ind. 412; Pennsylvania Ry. Co. *v.* Ebaugh, 152 Ind. 531; Hancock *v.* Norfolk & W. Ry. Co. (N. C. '99), 32 S. E. 679.

[1]Braceville Coal Co. *v.* People, 147 Ill. 66, decided in 1893.

[1]Opinions of Justices, 163 Mass. 589; Hancock *v.* Yaden, 121 Ind. 366.

[2]Leep *v.* St. Louis, I. M. Ry. Co., 58 Ark. 407; State *v.* Brown & Sharpe Mfg. Co., 18 R. I. 16.

[3]Commonwealth *v.* Isenberg, 8 Kulp. 116; 4 Pa. Dist. 579; San Antonio & A. P. Ry. Co. *v.* Wilson (Tex. App.), 19 S. W. 910; Braceville Coal Co. *v.* People, 147 Ill. 66. In the Texas and Illinois cases cited, the regulations were declared to be unconstitutional, not only because they infringed the constitutional liberty of contract, but likewise because they offended the constitutional prohibition of special legislation. In the Illinois case, the court says: "There can be no liberty protected by government that is not regulated by such laws as will preserve the right of each citizen to procure his own

advancement in his own way, subject only to the restraints necessary to secure the same rights to all others. The fundamental principle upon which liberty is based is equality under the law. It has accordingly been held that liberty, as that term is used in the constitution, means not only freedom of the citizen from servitude and restraint, but is deemed to enhance the right of every man to be free in the use of his powers and faculties and to adopt and pursue such avocation or calling as he may choose, subject only to the restraints necessary to secure the common welfare. * * * Labor is the primary foundation of all wealth. The property which each one has in his own labor is the common heritage. And, as an incident to the right to acquire other property, the liberty to enter into contracts by which labor may be employed in such way as the laborer shall deem most beneficial, and of others to employ such labor, is necessarily included in the constitutional guaranty. * * * It is undoubtedly true that the people in their representative capacity may, by general law, render that unlawful in many cases, which had hitherto been lawful. But laws depriving particular persons, or classes of persons, of rights enjoyed by the community at large, to be valid, must be based upon some existing distinction or reason, not applicable to others, not included within its provisions."

[1]In Frorer *v.* People, 141 Ill. 171, and State *v.* Coal and Coke Co., 33 W. Va. 188, an act was declared to be unconstitutional, which prohibited miners and manufacturers from selling merchandise and supplies to employees at a greater per cent profit than at which they sell to others. It was, however, held by the court to be class legislation. In Frorer *v.* People, the court say: "The privilege or liberty to engage in or control the business of keeping and selling clothing, provisions, groceries, etc., to employees is one of profit, and thus, by the effect of these sections (of the prohibitive law), what the employer in other industries may do for their pecuniary gain with impunity and have the law to protect and enforce, the miner and manufacturer, under precisely the same circumstances and conditions, are prohibited from doing for their pecuniary gain. The same act, in substance and in principle, if done by the one, is lawful; but if done by the other, is not only unlawful, but a misdemeanor."

[1]In re House Bill No. 147, 23 Colo. 504; Hancock *v.* Yaden, 121 Ind. 366; State *v.* Peel Spirit Coal Co., 36 W. Va. 802; Haun *v.* State (Kans. App.), 54 P. 130. In an earlier case in West Virginia, State *v.* Goodwill Slate & Fire Creek Coal Co., 33 W. Va. 179, an act was declared to be unconstitutional, which prohibited persons engaged in mining or manufacturing from paying the wages of employees in orders on their truck stores, on the ground that it was class legislation. In the case in 36 W. Va. 802, the act, under inquiry, applied to all persons or corporations, who are engaged in any trade or business.

[2]The West Virginia cases are cited in the preceding note. The Illinois case, Frorer *v.* People, 141 Ill. 171 (see preceding note), pronounced the law unconstitutional which prohibited the keeping of truck-stores by manufacturers and miners. The court say in part: "The privilege of contracting is both a liberty and a property right, and if A. is denied the right to contract and acquire property in a manner which he has hitherto enjoyed under the law, and which B. and C. are thus allowed by the law to enjoy, it is clear that he is deprived of both liberty and property to the extent that he is thus denied the right to contract." This conclusion is affirmed upon rehearing in Frorer *v.*

People, 142 Ill. 387. In Missouri, where the statute was confined in its application to persons, corporations and firms, who are engaged in manufacturing and mining; in the first hearing of a case coming up under the provisions of the statute, the Supreme Court of the State denied that the statute was class legislation, or was an unlawful infringement of the constitutional liberty of contract in general. State *v.* Loomis (Mo.), 20 S. W. Rep. 332. But, upon a rehearing, the statute was declared to be unconstitutional, on the ground that it was class legislation, in that its provisions did not apply to all kinds of trades and businesses, but only to two or more enumerated kinds of employment. State *v.* Loomis, 115 Mo. 307.

[1]"The act is an infringement alike of the right of the employer and the employee; more than this, it is an insulting attempt to put the laborer under a legislative tutelage, which is not only degrading to his manhood, but subversive of his rights as a citizen of the United States. He may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal, and any and every law that proposes to prevent him from so doing, is an infringement of his constitutional privileges, and consequently vicious and void." Godcharles *v.* Wigeman, 113 Pa. St. 431.

[1]Birdsall *v.* Twenty-third St. Ry. Co., 8 Daly, 419; Bowes *v.* Press, 70 L. T. R. 116.

[2]Commonwealth *v.* Perry, 155 Mass. 117; Commonwealth *v.* Potomska Mills, 155 Mass. 122.

[1]Leep *v.* St. Louis, I. M. & S. Ry. Co., 58 Ark. 407; Paul *v.* St. Louis, I. M. & S. Ry. Co., 64 Ark. 83; *s. c.* 173 U. S. 404. In affirming the decision of the Supreme Court of Arkansas, the Supreme Court of the United States held the statute to be constitutional, as an amendment to the charter of the railroad company, the power to amend or repeal such charter having been reserved by the State.

[2]Warren *v.* Solen, 112 Ind. 213; Ripley *v.* Evans, 87 Mich. 217. In the latter case, the laborer's lien for wages was given priority over the mortgage of the coal mines, which had been given after the enactment of the law.

[1]Waters *v.* Wolf, 162 Pa. St. 153; McMaster *v.* West Chester State Normal School, 162 Pa. St. 260; Lea *v.* Lewis, 7 Kulp, 164; 13 Pa. Co. Ch. Rep. 567.

[2]Palmer *v.* Tingle, 55 Ohio St. 423; Young *v.* Lion Hardware Co., 55 Ohio St. 423.

[1]Art. IV., Sect. 2, Const. U. S.

[2]In Pennsylvania, a statute imposed upon the employers of alien laborers a tax of three cents per day for each day that each of such laborers may be employed, and authorized the employers to deduct the tax so imposed from the daily wage of the laborer. The act was held to be unconstitutional, in that it deprived the laborer of the equal protection of the law, in violation of the Fourteenth Amendment of the Constitution of the United States. Fraser *v.* McConway & Torley Co., 82 Fed. 257. See Juniata Limestone Co. *v.* Fagley, 187 Pa. St. 193. A New York statute made it a crime for alien laborers to be employed on public works by a contractor who is

constructing them under contract with a municipal corporation. In a carefully prepared opinion, Judge White held the statute to be void and unconstitutional on three distinct grounds: 1. Because it was in violation of the constitution of New York, Art. I, § 1, which declares that no citizen shall be deprived of any of his rights or privileges except by the law of the land or the judgment of his peers, and Art. I, § 6, which provides that no person shall be deprived of his liberty or property without due process of law. 2. That it was in violation of the Fourteenth Amendment of the constitution of the United States, which forbids any State making a law which shall abridge the privileges and immunities of citizens of the United States, or deprive any person of liberty or property without due process of law; and 3. (so far as the alien laborers were Italians), because it violated the third article of the treaty between the United States and Italy, which guarantees to resident Italians the same rights and privileges which are secured to the citizens of the United States. People *v.* Warren, 34 N. Y. S. 942.

[1]As to which, see *ante,* § 93.

[2]United States *v.* Craig, 28 Fed. 795; In re Florio, 43 Fed. 114.

[3]Ex parte Kubach, 85 Cal. 274.

[4]State *v.* Moore, 113 N. C. 697.

[1]State *v.* Julow, 129 Mo. 163.

[2]Davis *v.* State, 30 Wkly. Law Bul. 342.

[3]In re Eight-Hour Law, 21 Colo. 29.

[1]This is the conclusion of the court in Low *v.* Rees Printing Co., 41 Neb. 127; Wheeling Bridge & Term. Ry. Co. *v.* Gilmore, 8 Ohio C. C. 658. In the former case, as in many other cases, of labor legislation, the act was also declared to be constitutionally objectionable, because it was class legislation, in that it excluded from its operation those who were engaged in farm or domestic labor.

[2]Bachelder *v.* Bickford, 62 Me. 526.

[3]Luske *v.* Hotchkiss, 37 Conn. 219; Bartlett *v.* Street Ry. Co., 82 Mich. 658; Schnurr *v.* Savigny, 85 Mich. 144; Helphenstine *v.* Hartig, 5 Ind. App. 172; Grisell *v.* Noel Bros. Flour-Feed Co., 9 Ind. App. 251.

[4]McCarthy *v.* Mayor of New York, 96 N. Y. 1; Luske *v.* Hotchkiss, 37 Conn. 219.

[1]See People *v.* Ewer, 141 N. Y. 129.

[2]See *post,* §§ 195, 196.

[1]Commonwealth *v.* Hamilton Mfg. Co., 120 Mass. 383.

[2]Ritchie *v.* People, 155 Ill. 101, the court, applying to regulations of the hours of women's work, the following general principle: "Labor is property, and the laborer has the same right to sell his labor and to contract with reference thereto as has any other property owner. In this country the legislature has no power to prevent persons who are *sui juris* from making their contracts, nor can it interfere with the freedom of contract between the workman and the employer."

[1]People *v.* Phyfe, 136 N. Y. 554.

[2]Holden *v.* Hardy, 14 Utah, 71 (46 P. 756); *s. c.* 169 U. S. 366. The Supreme Court did not undertake to pass upon the constitutionality of general regulations of the hours of labor, where the employment was not unwholesome.

[1]People *v.* Warren, 77 Hun, 120. The force of this decision has, however, been somewhat diminished, on appeal to the Court of Appeals, by the decision of the latter court, holding that the regulation in question did not apply to the superintendent of the contractor company. People *v.* Beck, 144 N. Y. 225.

[2]Ex parte Kubach, 85 Cal. 274: State *v.* Morton, 5 Ohio N. P. 183.

[3]United States *v.* Martin, 94 U. S. 400. In United States *v.* Ollinger, 55 Fed. 959, the constitutionality of the regulation was not settled, the court holding that the regulation did not apply to the defendant.

[1]See *post,* § 147, for a further discussion of sanitary and other regulations of premises which are devoted to purposes of trade and work.

[2]In New York, it was held that a law, prohibiting the manufacture of cigars in a tenement house, was an unconstitutional interference with personal liberty. In the matter of Jacobs, 98 N. Y. 98. See *post,* § 147, for a full presentation of this case.

[3]This provision was held to be self-executing, and needed no statute to put into operation. Illinois Central Ry. Co. *v.* Ihlenberg, 75 Fed. 873.

[1]Durkin *v.* Kingston Coal Co., 171 Pa. St. 193. But see People *v.* Smith, 108 Mich. 527, where it was held that the State may, in the exercise of the police power, make all regulations for the protection of those who are engaged in dangerous employments.

[2]Phila. Ball Club *v.* Hallman, 8 Pa. Co. Ct. 51.

[1]Cal. Civ. Code, 1980. A similar provision is to be found in the Montana Code. Mon. Civ. Code, 2675.

[2]In re Chung Fat, 96 Fed. 202. In this case, an alien seaman was impressed.,

[3]Arthur *v.* Oakes, 63 Fed. 310; 11 C. C. A. 209; Reynolds *v.* Everett, 144 N. Y. 189. In Southern California Ry. *v.* Rutherford, 62 Fed. 796, Judge Ross granted an injunction to compel the employees of a railroad to perform their duties as long as

they have not formally quitted their employment. This would seem to involve the principle, that an employee cannot compel an employer to discharge him and that, until he quits the employment, he can be compelled to perform his duties.

[1]In Robertson *v.* Baldwin, 165 U. S. 275, it was held that the Revised Statutes, §§ 4598, 4599, which authorized the apprehension, imprisonment and return on board ship of a deserting seaman in the merchant marine, do not contravene the prohibition of involuntary servitude, as set forth in the Thirteenth Amendment of the United States Constitution. The court relied upon the fact that the compulsory performance of the services of a seaman, who had shipped under sailing contract, was an exception to the general law which had antedated the constitutional provisions, and for that reason would not come within the provisions of the constitutional prohibition. The better ground would seem to be that a seaman, when he signs shipping articles, undertakes to render certain services for a determinate period; and, being for a determinate period, this labor contract can be specifically enforced like any other contract. It is not true that courts of equity have in the past refused to enforce specifically contracts for personal services, where the character of the services did not require the exercise of any unusual skill. The rule of equity has been that a mandatory injunction will issue for the specific performance of a contract for personal services, where the services were of such a nature that the court could secure their specific performance. But where peculiar skill is required in the performance of the services, the courts of equity have refused to issue an injunction, for the reason that they cannot by any process of the court compel the exercise of the necessary skill. Kemble *v.* Kean, 6 Sim. 333; Kimberley *v.* Jennings, 6 Sim. 340; Manhattan Mfg. Co. *v.* N. J. Stock Yards, etc., Co., 22 N. J. Eq. 161; Gallagher *v.* Fayette Co. R. R. Co., 38 Pa. St. 102; Hahn *v.* Concordia Society, 42 Md. 460; Smith *v.* McElwain, 57 Ga. 247; Bank of California *v.* Fresno, etc., Co., 53 Cal. 201. But the court of equity has in such cases the power to prevent the recalcitrant employee from engaging with another in a similar employment during the stipulated term of service. Jennings *v.* Brighton, etc., Bd., 4 De G. J. & S. 735; Wolverhampton, etc., Ry. *v.* London, etc., Ry., L. R. 16 Eq. 433; Montague *v.* Flockton, L. R. 16 Eq. 189; Donnell *v.* Bennett, L. R. 22 Ch. D. 835; West. U. Tel. Co. *v.* Union Pac. Ry. Co., 1 McCrary, 558; West. U. Tel. Co. *v.* St. Joe, etc., Ry. Co., 1 McCrary, 565; Hamblin *v.* Dinneford, 2 Edw. Ch. 529; Metropolitan Exhibition Co. *v.* Ewing, 42 Fed. 198; 24 Abb. N. C. 419; Daly *v.* Smith, 49 How. P. 150; Alleghany Base Ball Club *v.* Bennett, 14 Fed. 257; McCaull *v.* Braham, 16 Fed. 37; Healy *v.* Allen, 38 La. Ann. 867.

[1]State *v.* Williams, 32 S. C. 123. The Arkansas statute reads: "If any laborer shall, without good cause, abandon his employer before the expiration of his contract, he shall be liable to such employer for the full amount of any account he may owe him, and shall forfeit to his employer all wages or share of crop due him, or which might become due him from his employer." The Tennessee statute is similar in phraseology and terms.

[2]Reg. *v* Bunn, 12 Cox C. C. 316.

[1]Harmon *v.* Salmon Falls Co., 35 Me. 447; Preston *v.* Am. Linen Co., 119 Mass. 400; Walls *v.* Coleman, 34 N. Y. State Rep. 283; 11 N. Y. S. 907.

[2]See Texas cases, cited in preceding sections, in which laws regulating particular employments have been declared to be unconstitutional as class legislation.

[1]St. Louis, I. M. & S. Ry. Co. *v.* Paul, 64 Ark. 83; Kansas City, Ft. S. & M. Ry. Co. *v.* Boland, 64 Ark. 83; Kansas City, Ft. S. & M. Ry. Co. *v.* Whiddick, 64 Ark. 83.

[1]Wallace *v.* Ga. C. & N. Ry. Co., 94 Ga. 732.

[1]Dowling *v.* Lancashire Ins. Co., 92 Wis. 63.

[2]Riley *v.* Franklin Ins. Co., 43 Wis. 449; Am. Queen Ins. Co. *v.* Leslie, 47 Ohio St. 1072; Am. Fire Ins. Co. *v.* State, 74 Miss. 24; Phoenix Ins. Co. *v.* Levy, 12 Tex. Civ. App. 45 (33 S. W. 992); Merchants' Ins. Co. *v.* Levy, 12 Tex. Civ. App. 45 (33 S. W. 999); Dugger *v.* Mechanics & T. Ins. Co., 95 Tenn. 245.

[3]Daggs *v.* Orient Ins. Co. of Hartford, Conn., 136 Mo. 382, *s. c.* 172 U. S. 557. In affirming the decision of the Missouri court, the national Supreme Court also declared that the statute in question was not objectionable on the ground that it was special legislation.

[1]White *v.* Conn. Mut. L. Ins. Co., 4 Dill. 177. But see, *contra,* Insurance Co. *v.* Currie, 13 Bush, 313.

[2]Mut. Ben. L. Ins. Co. *v.* Robison, 54 Fed. 580.

[3]Considine *v.* Metropolitan L. Ins. Co., 165 Mass. 462.

[4]Equitable L. Ins. Co. *v.* Clements, 140 U. S. 226. In this case, in the Circuit Court (32 Fed. 273), doubt was expressed by the presiding judge as to the correctness of his decision, because such a statute, when obligatory, might constitute an unconstitutional interference with the individual liberty of contract. But no such doubt is expressed by the Supreme Court.

[1]Commonwealth *v.* Morning Star, 144 Pa. St. 103.

[2]New York Life Ins. Co. *v.* Smith (Tex. Civ. App.), 41 S. W. 680.

[3]People *v.* Formosa, 131 N. Y. 478. The court say: "The nature of insurance contracts is such that each person effecting insurance cannot thoroughly protect himself. He is not competent to investigate the condition and solvency of the company in which he insures, and his contracts may run through many years, and mature only, as a rule, at his death. Under such circumstances, it is competent for the legislature, in the interests of the people and to promote the general welfare, to regulate insurance companies and the management of their affairs, and to provide by law for that protection to policy holders which they could not secure for themselves. * * * The business of life insurance in this State is mainly carried on by insurance companies organized by law and minute provisions are made regulating their incorporation and their business; and a department of the State government has been constituted to supervise them. The corporations organized under the laws of this State for life

insurance are absolutely under the direction and control of the legislature. It may specify how and on what terms they may do business and enact laws regulating their conduct and the conduct of their agents for their protection and the protection of their policy holders, and enforce obedience to such laws by such penalties, forfeitures and punishments as it may, within constitutional limits, prescribe. As all these corporations must act through agents, it has the same power and authority to regulate the conduct of their agents as it has to regulate the conduct of the corporations themselves. * * * We have not here the question as to what a private individual may do in the conduct of his private business, but the question here is as to the power of the legislature over corporations and their agents." * * *

"We may not be able to perceive the purpose or the wisdom of this act. It is sufficient that we perceive the legislative will in the act, and we need not speculate as to the policy which prompted it."

[1]See State *v.* Stone, 118 Mo. 388.

[1]Field, J., in Munn *v.* Illinois, 94 U. S. 136; 10 Bac. Abr. 264.

[1]Cooley's Principles of Const. Law, p. 235.

[2]Iowa Savings & Loan Assn. *v.* Heidt, 107 Iowa, 297; Zenith Building and Loan *v.* Heimabach (Minn. '99), 79 N. W. 609. But see Gordon *v.* Winchester Building & Loan Assn., 75 Ky. 110.

[3]See *post,* § 139.

[1]See *post,* § 166.

[1]4 Bl. Com. 154.

[2]1 Russ. Crimes (Grea. Ed.), 168.

[1]1 Bishop Crim. Law, § 970

[1]1 Bishop Crim. Law, § 968.

[2]Bishop Crim. Law, § 969.

[1]1 Hawk Pleas C., ch. 80, § 1; 1 Bl. Com. 150; Rex *v.* Waddington, 1 East, 43; 1 Smith's Lead. Cas. 367, 381; Lang *v.* Weeks, 2 Ohio (n. s.) 519; Thomas *v.* Tiles, 3 Ohio, 74; Barry *v.* Croskey, 2 Johns. & H. 1; Jones *v.* Lees, 1 H. & N. 189; Gulich *v.* Ward, 5 Halst. 87; Benjamin on Sales, 799.

[1]Hilton *v.* Eckersley, 6 Ellis & B. 47; Mitchell *v.* Reynolds, 1 P. Wms. 181; Homer *v.* Ashford, 3 Bing. 322; Homer *v.* Graves, 7 Bing. 735; Oregon Steam Nav. Co. *v.* Winsor, 20 Wall. 64; Alger *v.* Thacher, 19 Pick. 51; Dean *v.* Emerson, 102 Mass. 480; Ross *v.* Sadgbeer, 21 Wend. 166; Western Woodenware Association *v.* Starkey, 84 Mich. 76; Heichow *v.* Hamilton, 3 Greene (Iowa), 596. It is probably true that in

England, at an early day and in the first enunciations of judicial opinion on the subject, all contracts in restraint of trade were declared to be void, whether they were *per se* reasonable or unreasonable. See Dyer's case, Y. B. 2 H. 5, Pl. 22; Colgate *v.* Batchellor, Cro. Eliz. 872.

[2]Whitaker *v.* Howe, 3 Beav. 383; Dendy *v.* Henderson, 11 Exch. 194; Leather Cloth Co. *v.* Lorsant, L. R. 9 Ex. 345; Pierce *v.* Woodward, 6 Pick. 206; Saratoga Co. Bank *v.* King, 44 N. Y. 87; Curtis *v.* Gokey, 68 N. Y. 300; Perkins *v.* Clay, 54 N. Y. 518; Treat *v.* Shoninger Melodeon Co., 35 Conn. 543; Guerand *v.* Dandelet, 32 Md. 561; Ellis *v.* Jones, 56 Ga. 504; Smalley *v.* Greene, 52 Iowa, 241.

[3]Rousillon *v.* Rousillon, 14 Ch. D. 351; Oregon Steam Nav. Co. *v.* Winsor, 20 Wall. 64.

[1]Whittaker *v.* Howe, 3 Beav. 383.

[2]Butler *v.* Burleson, 16 Vt. 176; Cook *v.* Johnson, 47 Conn. 175; Swanson *v.* Kirby, 98 Ga. 586; McClurg's Appeal, 8 Smith (Pa.) 51; Hursen *v.* Gavis, 162 Ill. 377; Kramer *v.* Old, 119 N. C. 1; Davis *v.* Brown (Ky.), 32 S. W. 614; Tillinghast *v.* Boothby, 20 R. I. 59; O'Neal *v.* Hines, 145 Ind. 32; Smith *v.* Brown, 164 Mass. 584; McCurry *v.* Gibson, 108 Ala. 451.

[3]Taylor *v.* Blanchard, 13 Allen, 370; Dean *v.* Emerson, 102 Mass. 480; Nobles *v.* Bates, 7 Cow. 307; More *v.* Bonnet, 40 Cal. 251. In Althen *v.* Vreeland, (N. J.), Eq.; 36 A. 479, a contract, not to carry on a business within a radius of 1,000 miles, was held to be unreasonable. And so, likewise, in Consumers' Oil Co. *v.* Nunnemaker, 142 Ind. 560, a contract was held to be in unreasonable restraint of trade, which provided that one party cannot carry on his business in the State of Indiana for five years, except in Indianapolis.

[4]Nordenfelt *v.* Nordenfelt Guns and Ammunition Co., 94 H. L. Ap. Cases, 535, a contract in restraint of trade was sustained as reasonable, which provided that the patentee and manufacturer of guns and ammunition, who had transferred all his patent rights, would not for 25 years engage directly or indirectly in the same business. So, also, a contract that one shall not carry on a certain business, as long as he remains in the employ of another, is a reasonable and valid contract in restraint of trade. Carnig *v.* Carr, 167 Mass. 544.

[1]Woods *v.* Hart, 50 Neb. 497. In Brewing Association *v.* Houck, 88 Tex. 184, the contract of a brewing association with certain persons, to furnish them with beer and to furnish it to no other persons in the same city, was held to be a reasonable contract in restraint of trade.

[2]Matthew *v.* Associated Press, 136 N. Y. 333. The court said: "The latest decisions of courts in this country and in England show a strong tendency to very greatly circumscribe and narrow the doctrine of avoiding contracts in restraint of trade. The courts do not go to the length of saying that contracts which they now would say are in restraint of trade are, nevertheless, valid contracts, and to be enforced; they do,

however, now hold many contracts not open to the objection that they are in restraint of trade, which a few years back would have been avoided on that sole ground, both here and in England. * * * So that, when we agree that a by-law which is in restraint of trade is void, we are still brought back to the question, What is a restraint of trade in the modern definition of that term?

"The authority to make by-laws must also be limited by the scope and purpose of the association. I think this by-law is thus limited, and that is not in restraint of trade, as the courts now interpret that phrase."

[3]Inter-Ocean Pub. Co. *v.* Associated Press (Ill. 1900), 56 N. E. 822.

[1]Com. *v.* Carlisle, Brightley, 40; Hooker *v.* Vandewater, 4 Denio, 349; Stanton *v.* Allen, 5 Denio, 434; Marsh *v.* Russell, 66 N. Y. 288; Arnot *v.* Pittston, etc., Coal Co., 68 N. Y. 558; Wiggins Ferry Co. *v.* Ohio, etc., Ry., 72 Ill. 360; Craft *v.* McConoughy, 79 Ill. 346; West. Un. Tel. Co. *v.* Chicago & P. R. R. Co., 86 Ill. 246; Central Ohio Salt Co. *v.* Guthrie, 35 Ohio St. 666; Fairbank *v.* Leary, 40 Wis. 637. See also, *post,* § 109, and for the more modern development of the laws against contracts and combinations in restraint of trade, §§ 110 *et seq.* Of the same character and equally prohibited by law, as being in unlawful restraint of trade, is an agreement among certain manufacturers that one of the parties to the contract will keep his plant in idleness for a given number of years, in consideration of his receipt from the other parties to the agreement of a certain percentage on the sales of the latter. Oliver *v.* Gilmore, 52 Fed. 562; Am. Strawboard Co. *v.* Peoria Strawboard Co., 65 Ill. App. 502. In the latter case, the contract took the form of a lease of the plant of one by the other party to the agreement, and the consideration was paid as rent for the lease of the property of the former.

[2]Hilton *v.* Eckersley, 6 El. & Bl, 47, 66.

[1]Hornby *v.* Close, L. R. 2 Q. B. 183.

[2]The character, scope and constitutional powers of labor organizations are more fully treated in §§ 114, 115.

[1]Dos Passos on Stock Brokers, p. 454.

[2]Rex *v.* De Berenger, 3 M. & S. 67. See, also, Hitchcock *v.* Coker, 6 Ad. & El. 438; Hinde *v.* Gray, 1 M. & G. 195; Horne *v.* Ashford, 3 Bing. 322; Com. *v.* Hunt, 4 Met. 111.

[3]Marsh *v.* Russell, 2 Lans. 75; Stanton *v.* Allen, 5 Denio, 434; 2 Kent Com. 699; Bissbane *v.* Adams, 3 Comst. 129; Hooker *v.* Vandewater, 4 Denio, 349. See Craft *v.* McConoughy, 79 Ill. 346.

[1]46 Mich. 447.

[2]60 N. Y. 548.

[3]14 Wend. 9.

[4]See Sampson *v.* Shaw, 101 Mass. 145; Crawford *v.* Wick, 18 Ohio, 190; Morris Run Coal Co. *v.* Barclay Coal Co., 68 Pa. 173; Central Ohio Salt Co. *v.* Guthrie, 35 Ohio, 666. "Whenever a particular staple is essential to the health and comfort of a community, a combination to absorb it, for the purpose of extortion, is invalid." 1 Hawk. P. C., ch. 80, § 1; 1 Bl. Com. 150; Rex *v.* Waddington, 1 East, 43; Indian Bagging Co. *v.* Cock & Co., 14 La Ann. 164; 1 Smith's Lead. Cas. 307, 381; Lang *v.* Weeks, 2 Ohio (n. s.), 519; Thomas *v.* Tiles, 3 Ohio, 74; Barry *v.* Croskey, 2 Johns. & H. 1.

[1]Maguire *v.* Smock, 42 Ind. 1; Staunton *v.* Allen, 5 Denio, 434; Hooker *v.* Vandewater, 4 Denio, 349; Oregon St. Nav. Co. *v.* Winsor, 20 Wall. 64.

[2]"By the law of New York, no conspiracies are punishable criminally, except those there stated, and among others the conspiracy of two or more persons '*to commit any act injurious* to the public health, to public morals, or *trade or commerce,* or for the perversion or obstruction of justice, or due administration of the laws' shall constitute a misdemeanor. Under this broad and comprehensive language, which is practically the rule in all the States, either by adoption of the common law or express statute, it will not be difficult to punish infamous conspiracies or combinations, whether their object be to affect the necessaries of life, or securities, or other property in which the public have an interest." Dos Passos on Stock Brokers, 462, 463; Peck *v.* Gurney, L. R. 6 H. L. C. 377; Pasley *v.* Freeman, 3 J. R. 51; Bevan *v.* Adams, 19 W. R. 76; Beatty *v.* Evans, L. R. 7 H. L. C. 102; Pontifex *v.* Bignold's, 3 Scott, N. R. 390; Moore *v.* Burke, 4 F. & F. 258; Cross *v.* Lockett, 6 App. Pr. 247; Wakeman *v.* Dalley, 44 Barb. 498; Cazeaux *v.* Mali, 25 Barb. 578; Mouse *v.* Switz, 19 How. 275; In re Chandler, 13 Am. Law Reg. (n. s.) 260; *s. c.* Biss. C. C. 53; *sub. nom.* Ex parte Young.

[1]Coggs *v.* Bernard, 2 Ld. Raym. 909; Railroad *v.* Reeves, 10 Wall. 176; Bulkley *v.* Naumkeag, etc., Co., 24 How. 386; Fillebrown *v.* Grand Trunk, etc., Co., 55 Me. 462; Caldwell *v.* N. J. Steamboat Co., 47 N. Y. 282; Orange Co. Bk. *v.* Brown, 9 Wend. 85; Hayes *v.* Kennedy, 41 Pa. St. 378; Morrison *v.* Davis, 20 Pa. St. 171; Boyle *v.* McLaughlin, 4 H. & J. 291; New Brunswick, etc., Co. *v.* Tiers, 24 N. J. 697; Friend *v.* Woods, 6 Gratt. 139; Swindler *v.* Hilliard, 2 Rich. 286; Turney *v.* Wilson, 7 Yerg. 540; Powell *v.* Mills, 30 Miss. 231; Chicago, etc., R. R. Co. *v.* Sawyer, 69 Ill. 285; Merchants' Dispatch Co. *v.* Smith, 76 Ill. 542; McMillan *v.* Michigan, etc., R. R. Co., 16 Mich. 79; Bohannan *v.* Hammond, 42 Cal. 227. The exceptions to this general liability as an insurer are usually stated to be "the act of God, or of the public enemy." The "act of God" means any natural cause, which could not be avoided by human foresight. "What is precisely meant by the expression 'act of God' as used in the case of common carriers, has undergone discussion, but it is agreed that the notion of exception is those losses and injuries occasioned exclusively by natural causes, such as could not be prevented by human care, skill, and foresight. All the cases agree in requiring the entire exclusion of human agency from the cause of the injury or loss. If the loss or injury happen in any way through the agency of man, it cannot be considered the act of God; nor even if the act or negligence of man contributes to

bring or leave the goods of the carrier under the operation of natural causes that work to their injury, is he excused. In short, to excuse the carrier, the act of God, or *vis divina,* must be the sole and immediate cause of the injury. If there be any co-operation of man, or any admixture of human means, the injury is not, in a legal sense, the act of God." Wright, J., in Michaels *v.* N. J. Cent. R. R. Co., 30 N. Y. 571.

[1]New Jersey Steam Nav. Co. *v.* Merchant's Bank, 6 How. 344; Railroad Co. *v.* Manufacturing Co., 16 Wall. 318; Fillebrowne *v.* Grand Trunk R. Co., 55 Me. 462; Brown *v.* Eastern R. Co., 11 Cush. 97; Buckland *v.* Adams Express Co., 97 Mass. 124; Hollister *v.* Nowlen, 19 Wend. 234; Bennett *v.* Dutton, 10 N. H. 481; McCoy *v.* Erie, etc., R. R. Co., 42 Md. 498; Smith *v.* N. C. R. R., 64 N. C. 235; Southern Express Co. *v.* Caperton, 44 Ala. 101; Jones *v.* Voorhees, 10 Ohio, 145; McMillan *v.* Michigan, etc., R. R., 16 Mich. 79.

[2]New Jersey, etc., Co. *v.* Merchants' Bk., 6 How. 344; York Co. *v.* Central R. R. Co., 3 Wall. 107; Sager *v.* Portsmouth, etc., R. R. Co., 31 Me. 228; School Dist. *v.* Boston, etc., R. R. Co., 102 Mass. 552; Camden, etc., R. R. *v.* Baldauf, 17 Pa. St. 67; Bickham *v.* Smith, 62 Pa. St. 45; Delaware, etc., R. R. *v.* Starrs, 69 Pa. St. 36; Welch *v.* Boston, etc., R. R., 41 Conn. 333; Virginia, etc., R. R. *v.* Sayers, 26 Gratt. 328; Smith *v.* N. C. R. R., 64 N. C. 235; Swindler *v.* Hilliard, 2 Rich. 286; Berry *v.* Cooper, 28 Ga. 543; Indianapolis, etc., R. R. *v.* Allen, 31 Ind. 394; Southern Express *v.* Moon, 39 Miss. 822; Gaines *v.* Union Transp. Co., 28 Ohio St. 418; Great West. R. R. *v.* Hawkins, 17 Mich. 57; *s. c.* 18 Mich. 427; Adams Exp. Co. *v.* Stettaners, 61 Ill. 174; Sturgeon *v.* St. Louis, etc., R. R., 65 Mo. 569; South, etc., R. R. *v.* Henlein, 52 Ala. 606; Mo. Val. R. R. *v.* Caldwell, 8 Kan. 244; N. O. Ins. Co. *v.* N. O., etc., R. R., 20 La. Ann. 302; Hooper *v.* Wells, *27* Cal. 11.

[1]Wells *v.* N. Y. Cent. R. R., 24 N. Y. 181; Perkins *v.* N. Y. Cent. R. R., 24 N. Y. 197; Smith *v.* N. Y. Cent. R. R., 24 N. Y. 222; Bissell *v.* N. Y. Cent. R. R., 25 N. Y. 442; Poucher *v.* N. Y. Cent. R. R., 49 N. Y. 263; Kinney *v.* Cent. R. R., 32 N. J. 407; *s. c.* 34 N. J. 513.

[2]Railroad Co. *v.* Lockwood, 17 Wall. 357; Cleveland, etc., R. R. *v.* Curran, 19 Ohio St. 1; Ohio, etc., R. R. *v.* Selby, 47 Ind. 471.

[3]Philadelphia, etc., R. R. *v.* Derby, 14 How. 468; Pa. R. R. Co. *v.* Butler, 57 Pa. St. 335; Ind. Cent. R. R. *v.* Mundy, 21 Ind. 48; Jacobus *v.* St. Paul, etc., R. R., 20 Minn. 125.

[4]"While we hold this argument did not exempt the railroad company from the gross negligence of its employees, we are free to say that it does exempt it from all other species or degrees of negligence not denominated gross, or which might have the character of recklessness." Ill. Cent. R. R. *v.* Read, 37 Ill. 484.

[1]McAndrew *v.* Electrical Tel. Co., 17 C. B. 3; Grinnell *v.* West. Union Tel. Co., 113 Mass. 299 (18 Am. Rep. 485); True *v.* Int. Tel. Co., 60 Me. 9; Young *v.* West. Union Tel. Co., 65 N. Y. 163; Passmore *v.* W. U. Tel. Co., 78 Pa. St. 238; Berney *v.* N. Y., etc., Tel. Co., 18 Md. 341; W. U. Tel. Co. *v.* Carew, 15 Mich. 525. In Illinois, it is not

permitted to telegraph companies to stipulate that they will not be responsible for errors arising solely from the negligence of the operators. They can stipulate against liability for errors, only where they occur through some natural cause beyond the company's control. Tyler *v.* West. Union Tel. Co., 60 Ill. 421 (14 Am. Rep. 38); West. Union Tel. Co. *v.* Tyler, 74 Ill. 163. See Wann *v.* West. Union Tel. Co., 37 Mo. 472; Sweatland *v.* Ill., etc., Tel. Co., 27 Iowa, 432; Candee *v.* West. Union Tel. Co., 34 Wis. 471; West. Union Tel. Co. *v.* Graham, 1 Col. 230. In the last case it was held that the condition against liability, where the message is not repeated, is no defense in an action for failure to deliver.

[1]See § 108 for cases and fuller exposition of the common law in this matter.

[2]Mogul Steamship Co. *v.* McGregor, 21 Q. B. D. 544; *s. c.* 23 Q. B. D. 598.

[1]Lord Coleridge said: "But it is said that the motive of these acts was to ruin the plaintiffs, and that such a motive, it has been held, will render the combination itself wrongful and malicious, and that if damage has resulted to the plaintiffs an action will lie. I concede that if the premises are established the conclusion follows. It is too late to dispute, if I desired it, as I do not, that a wrongful and malicious combination to ruin a man in his trade may be ground for such an action as this. Was then this combination such? The answer in this question has given me much trouble, and I confess to the weakness of having long doubted and hesitated before I could make up my mind. There can be no doubt that the defendants were determined, if they could, to exclude the plaintiffs from this trade. Strong expressions were drawn from some of them in cross-examination, and the telegrams and letters showed the importance they attached to the matter, their resolute purpose to exclude the plaintiffs if they could, and to do so without any consideration for the results to the plaintiffs, if they were successfully excluded. This, I think, is made out, and I think no more is made out than this. Is this enough? It must be remembered that all trade is and must be in a sense selfish; trade not being infinite, nay, the trade of a particular place or district being possibly very limited, what one man gains another loses. In the hand-to-hand war of commerce, as in the conflicts of public life, whether at the bar, in parliament, in medicine, in engineering (I give examples only) men fight on without much thought of others, except a desire to excel or to defeat them. Very lofty minds, like Sir Philip Sidney, with his cup of water, will not stoop to take an advantage, if they think another wants it more. Our age, in spite of high authority to the contrary, is not without its Sir Philip Sidneys; but these are counsels of perfection which it would be silly indeed to make the measure of the rough business of the world as pursued by ordinary men of business. The line is in words difficult to draw, but I cannot see that these defendants have in fact passed the line which separates the reasonable and legitimate selfishness of traders from wrong and malice. In 1884 they admitted the plaintiffs to their conference; in 1885 they excluded them, and they were determined, no doubt, if they could, to make the exclusion complete and effective, not from any personal malice or ill-will to the plaintiffs as individuals, but because they were determined if they could to keep the trade to themselves; and if they permitted persons in the position of the plaintiffs to come in and share it, they thought, and honestly, and, as it turns out, correctly thought, that for a time at least there would be an end of their gains."

Judge Bowen—on appeal in Queen's Bench Division: "The defendants, we are told by plaintiffs' counsel, might lawfully lower rates, provided they did not lower them beyond a 'fair freight,' whatever that may mean. But where is it established that there is any such restriction upon commerce? And what is to be the definition of a 'fair freight?' It is said that it ought to be a normal rate of freight, such as is reasonably remunerative to the shipowner. But over what period of time is the average of this reasonable remunerativeness to be calculated? All commercial men with capital are acquainted with the ordinary expedient of sowing one year a crop of apparently unfruitful prices, in order, by driving competition away, to reap a fuller harvest of profit in the future; and until the present argument at the bar it may be doubted whether ship-owners or merchants were ever deemed to be bound by law to conform to some imaginary 'normal' standard of freights or prices, or that law courts had a right to say to them in respect of their competitive tariffs, 'Thus far shalt thou go and no further.' To attempt to limit English competition in this way would probably be as hopeless an endeavor as the experiment of King Canute. But on ordinary principles of law no such fetter on freedom of trade can, in my opinion, be warranted. A man is bound not to use his property so as to infringe upon another's rights. *Sic utere tuo ut alienum non laedas.* If engaged in actions which may involve danger to others, he ought, speaking generally, to take reasonable care to avoid endangering them. But there is surely no doctrine of law which compels him to use his property in a way that judges and juries may consider reasonable. See Chasemore *v.* Richards. If there is no such fetter upon the use of property known to the English law, why should there be any such a fetter upon trade?

It is urged, however, on the part of the plaintiffs, that even if the acts complained of would not be wrongful had they been committed by a single individual, they become actionable when they are the result of concerted action among several. In other words, the plaintiffs, it is contended, have been injured by an illegal conspiracy. Of the general proposition, that certain kinds of conduct not criminal in any one individual may become criminal if done by combination among several, there can be no doubt. The distinction is based on sound reason, for a combination may make oppressive or dangerous that which, if it proceeded only from a single person, would be otherwise, and the very fact of the combination may show that the object is simply to do harm, and not to exercise one's own just rights."

"In the application of this undoubted principle it is necessary to be very careful not to press the doctrine of illegal conspiracy beyond that which is necessary for the protection of individuals or of the public; and it may be observed in passing that as a rule it is the damage wrongfully done, and not the conspiracy, that is the gist of actions on the case for conspiracy. See Skinner *v.* Gunton; Hutchins *v.* Hutchins. But what is the definition of an illegal combination? It is an agreement by one or more to do an unlawful act, or to do a lawful act by unlawful means. O'Connell *v.* The Queen; Reg. *v.* Parnell; and the question to be solved is whether there has been any such agreement here. Have the defendants combined to do an unlawful act? Have they combined to do a lawful act by unlawful means? A moment's consideration will be sufficient to show that this new inquiry only drives us back to the circle of definitions and legal propositions which I have already traversed in the previous part of this

judgment. The unlawful act agreed to, if any, between the defendants must have been the intentional doing of some act to the detriment of the plaintiffs' business without just cause or excuse. Whether there was any such justification or excuse for the defendants is the old question over again, which, so far as regards an individual trader, has been already solved. The only deferentia that can exist must arise, if at all, out of the fact that the acts done are the joint acts of several capitalists, and not of one capitalist only. The next point is whether the means adopted were unlawful. The means adopted were competition carried to a bitter end. Whether such means are unlawful is in like manner nothing but the old discussion which I have gone through, and which is now revived under a second head of inquiry, except so far as a combination of capitalists differentiates the case of acts jointly done by them from similar acts done by a single man of capital. But I find it impossible myself to acquiesce in the view that the English law places any such restriction on the combination of capital as would be involved in the recognition of such a distinction. If so, one rich capitalist may innocently carry competition to a length which would become unlawful in the case of a syndicate with a joint capital no larger than his own, and one individual merchant may lawfully do that which a firm or a partnership may not. What limits, on such a theory, would be imposed by law on the competitive action of a joint-stock company limited, is a problem which might well puzzle a casuist. The truth is that the combination of capital for purposes of trade and competition is a very different thing from such a combination of several persons against one, with a view to harm him, as falls under the head of an indictable conspiracy. There is no just cause or excuse in the latter class of cases. There is such a just cause or excuse in the former. There are cases in which the very fact of a combination is evidence of a design to do that which is hurtful without just cause—is evidence—to use a technical expression—of malice. But it is perfectly legitimate, as it seems to me, to combine capital for all the mere purposes of trade for which capital may, apart from combination, be legitimately used in trade. To limit combinations of capital, when used for purposes of competition, in the manner proposed by the argument of the plaintiffs, would, in the present day, be impossible—would be only another method of attempting to set boundaries to the tides. Legal puzzles which might well distract a theorist may easily be conceived of imaginary conflicts between the selfishness of a group of individuals, and the obvious well-being of other members of the community."

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"Lastly, we are asked to hold the defendants' Conference or association illegal, as being in restraint of trade. The term 'illegal' here is a misleading one. Contracts, as they are called in restraint of trade, are not in my opinion illegal in any sense, except that the law will not enforce them. It does not prohibit the making of such contracts; it merely declines after they have been made to recognize their validity. The law considers the disadvantage so imposed upon the contract a sufficient shelter to the public. The language of Crompton, J., in Hilton *v.* Eckersley, is, I think, not to be supported. No action at common law will lie or ever has lain against any individual or individuals for entering into a contract merely because it is in restraint of trade. Lord Eldon's equity decision in Cousins *v.* Smith is not very intelligible, even if it be not open to the somewhat personal criticism passed on it by Lord Campbell in his Lives

of the Chancellors. If indeed it could be plainly proved that the mere formation of ‘conferences,’ ‘trusts,’ or ‘associations’ such as these were always necessarily injurious to the public—a view which involves, perhaps, the disputable assumption that in a country of free trade, and one which is not under the iron regime of statutory monopolies, such confederations can ever be really successful—and if the evil of them were not sufficiently dealt with by the common law rule, which held such agreements to be void as distinct from holding them to be criminal, there might be some reason for thinking that the common law ought to discover within its arsenal of sound common-sense principles some further remedy commensurate with the mischief. Neither of these assumptions is, to my mind, at all evident, nor is it the province of judges to mould and stretch the law of conspiracy in order to keep pace with the calculations of political economy. If peaceable and honest combinations of capital for purposes of trade competition are to be struck at, it must, I think, be by legislation, for I do not see that they are under the ban of the common law.

“In the result, I agree with Lord Coleridge, C. J., and differ, with regret, from the Master of the Rolls. The substance of my view is this, that competition, however severe and egotistical, if unattended by circumstances of dishonesty, intimidation, molestation, or such illegalities as I have above referred to, gives rise to no cause of action at common law. I myself should deem it to be a misfortune if we were to attempt to prescribe to the business world how honest and peaceable trade was to be carried on in a case where no such illegal elements as I have mentioned exist, or were to adopt some standard of judicial ‘reasonableness,’ or of ‘normal’ prices, or ‘fair freights,’ to which commercial adventurers, otherwise innocent, were bound to conform.”

Judge Frye: “We have then to inquire whether mere competition, directed by one man against another, is ever unlawful. It was argued that the plaintiffs have a legal right to carry on their trade, and that to deprive them of that right by any means is a wrong. But the right of the plaintiffs to trade is not an absolute but a qualified right—a right conditioned by the like right in the defendants and all Her Majesty’s subjects, and a right therefore to trade subject to competition. Now, I know no limits to the right of competition in the defendants—I mean, no limits in law. I am not speaking of morals or good manners. To draw a line between fair and unfair competition, between what is reasonable and unreasonable, passes the power of the courts. Competition exists when two or more persons seek to possess or to enjoy the same thing; it follows that the success of one must be the failure of another, and no principle of law enables us to interfere with or to moderate that success or that failure so long as it is due to mere competition. I say mere competition, for I do not doubt that it is unlawful and actionable for one man to interfere with another’s trade by fraud or misrepresentation, or by molesting his customers, or those who would be his customers, whether by physical obstruction or moral intimidation.”

Lord Halsbury, in the House of Lords:—

“The learned counsel who argued the case for the appellants with their usual force and ability, were pressed from time to time by some of your Lordships to point out what act of unlawful obstruction, violence, molestation or interference was proved against

the associated body of traders, and, as I have said, the only wrongful thing upon which the learned counsel could place their fingers was the competition which I have already dealt with. Intimidation, violence, molestation, or the procuring of people to break their contracts, are all of them unlawful acts; and I entertain no doubt that a combination to procure people to do such acts is a conspiracy and unlawful.

"The sending up of ships to Hankow, which in itself and to the knowledge of the associated traders, would be unprofitable, but was done for the purpose of influencing other traders against coming there and so encouraging a ruinous competition is the one fact which appears to be pointed to as out of the ordinary course of trade. My Lords, after all, what can be meant by 'out of the ordinary course of trade?' I should rather think, as a fact, that it is very commonly within the ordinary course of trade so to compete for a time as to render trade unprofitable to your rival in order that when you have got rid of him you may appropriate the profits of the entire trade to yourself.

"I entirely adopt and make my own what was said by Lord Justice Bowen in the court below: 'All commercial men with capital are acquainted with the ordinary expedient of sowing one year a crop of apparently unfruitful prices, in order by driving competition away to reap a fuller harvest of profit in the future; and until the present argument at the bar it may be doubted whether ship-owners or merchants were ever deemed to be bound by law to conform to some imaginary 'normal' standard of freights or prices, or that law courts had a right to say to them in respect of their competitive tariffs, 'Thus far shalt thou go, and no further.'

"Excluding all I have excluded upon my view of the facts, it is very difficult indeed to formulate the proposition. What is the wrong done? What legal right is interfered with? What coercion of the mind, or will or of the person is effected? All are free to trade upon what terms they will, and nothing has been done except in rival trading which can be supposed to interfere with the appellants' interests."

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Lord Bramwell: "Where is such a contention to stop? Suppose the case put in the argument: In a small town there are two shops, sufficient for the wants of the neighborhood, making only a reasonable profit. They are threatened with a third. The two shopkeepers agree to warn the intending shopkeeper that if he comes they will lower prices, and can afford it longer than he. Have they committed an indictable offense? Remember the conspiracy is the offense, and they have conspired. If he, being warned, does not set up his shop, has he a cause of action? He might prove damages. He might show that from his skill he would have beaten one or both of the others. See in this case the judgment of Lord Esher, that the plaintiffs might recover for 'damages at large for future years.' Would a ship-owner who had intended to send his ship to Shanghai, but desisted owing to the defendant's agreement, and on being told by them they would deal with him as they had with the plaintiff, be entitled to maintain an action against the defendants! Why not? If yes, why not every ship-owner who could say he had a ship fit for the trade, but was deterred from using it?

[1]Diamond Match Co. *v.* Roeber, 106 New York, 481, the court said: "Steam and electricity have, for the purpose of trade and commerce, almost annihilated distance, and the whole world is now a mart for the distribution of the products of industry. The great diffusion of wealth and the restless activity of mankind striving to better their condition has greatly enlarged the field of human enterprise and created a vast number of new industries, which give scope to ingenuity and employment for capital and labor. The laws no longer favor the granting of exclusive privileges, and to a great extent business corporations are practically partnerships and may be organized by any persons who desire to unite their capital or skill in business, leaving a free field to all others who desire for the same or similar purposes to clothe themselves with a corporate character. The tendency of recent adjudications is marked in the direction of relaxing the rigor of the doctrine that all contracts in general restraint of trade are void, irrespective of special circumstances. Indeed, it has of late been denied that a hard and fast rule of that kind has ever been the law of England (Rousillon *v.* Rousillon, 14 L. R., Ch. Div. 351). The law has, for centuries, permitted contracts in partial restraint of trade, when reasonable; and in Horner *v.* Graves (7 Bing. 735), Chief Justice Tindal considered a true test to be "whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public." When the restraint is general, but at the same time is co-extensive only with the interest to be protected and with the benefit meant to be conferred, there seems to be no good reason why, as between the parties, the contract is not as reasonable as when the interest is partial and there is a corresponding partial restraint. And is there any real public interest which necessarily condemns the one and not the other? It is an encouragement to industry and to enterprise in building up a trade, that a man shall be allowed to sell the good-will of the business and the fruits of his industry upon the best terms he can obtain. If his business extends over a continent, does public policy forbid his accompanying the sale with a stipulation for restraint co-extensive with the business which he sells? If such a contract is permitted, is the seller any more likely to become a burden on the public than a man who, having built up a local trade only, sells it, binding himself not to carry it on in the locality? Are the opportunities for employment and for the exercise of useful talents so shut up and hemmed in that the public is likely to lose a useful member of society in the one case and not in the other? Indeed, what public policy requires is often a vague and difficult inquiry. It is clear that public policy and the interests of society favor the utmost freedom of contract, within the law, and require that business transactions should not be trammelled by unnecessary restrictions. 'If,' said Sir George Jessel, in Printing Company *v.* Sampson (19 Eq. Cas., L. R. 462) 'there is one thing more than any other which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that contracts when entered into freely and voluntarily, shall be held good and shall be enforced by courts of justice.' It has sometimes been suggested that the doctrine that contracts in general restraint of trade are void, is founded in part upon the policy of preventing monopolies, which are opposed to the liberty of the subject, and the granting of which by the king under claim of royal prerogative led to conflicts memorable in English history. But covenants of the character of the one now in question operate simply to prevent the covenantor from engaging in the business which he sells, so as to protect the purchaser in the enjoyment of what he has purchased. To the extent that the contract prevents the vendor from carrying on the

particular trade, it deprives the community of any benefit it might derive from his entering into competition. But the business is open to all others, and there is little danger that the public will suffer harm from lack of persons to engage in a profitable industry. Such contracts do not create monopolies. They confer no special or exclusive privilege. If contracts in general restraint of trade, where the trade is general, are void as tending to monopolies, contracts in partial restraint where the trade is local, are subject to the same objection, because they deprive the local community of the services of the covenantor in the particular trade or calling, and prevent his becoming a competitor with the covenantee. We are not aware of any rule of law which makes the motive of the covenantee the test of the validity of such a contract. On the contrary we suppose a party may legally purchase the trade and business of another for the very purpose of preventing competition, and the validity of the contract, if supported by a consideration, will depend upon its reasonableness as between the parties."

[1]See *post,* § 112, for the discussion and explanation of modern antitrust and anti-monopolistic laws.

[1]Thelusson *v.* Woodford, 1 B. & P. N. R. 396; *s. c.* 4 Ves. 227. Thelusson provided in his will that all his estate, principal and income, should be held intact for the purpose of accumulation, until the death of all his heirs, living at his death, and upon the death of the survivor of these heirs, the property was to be given to certain descendants described in the will. This will, and the litigation growing out of it, created such a sensation that Parliament passed a statute, which prohibited the accumulation of income and profits for a longer period than the life of the grantor, and twenty-one years thereafter or the minority of the beneficiary. See Tiedeman on Real Property, § 545.

[1]In the report of a committee of the legislature of New York, a trust is defined as a combination "to destroy competition and to restrain trade through the stockholders therein combining with other corporations or stockholders to form a joint-stock company of corporations and placing all powers in the hands of trustees." So far as this definition includes any other combinations than those which are accomplished by the establishment of a trust, it includes more than what is properly described as an industrial trust.

[1]In People *v.* North River Sugar Refining Co., 121 N. Y. 582, in pronouncing the act of a corporation in joining the trust as *ultra vires,* the court said: "It is quite clear that the effect of the defendant's action was to divest itself of the essential and vital elements of its franchise by placing them in trust; to accept from the State the gift of corporate life, only to disregard the conditions upon which it was given; to receive its powers and privileges merely to put them in pawn; and to give away to an irresponsible board its entire independence and self-control. It has helped to create an anomalous trust, which is, in substance and effect, a partnership of twenty separate corporations. It is a violation of law for corporations to enter into a partnership. The vital characteristics of the corporations are of necessity drowned in the paramount authority of the partnership." The articles of agreement of the Sugar Trust are published in full in this case. In the case of the State *v.* Standard Oil Co., 49 Ohio St.

137, in which the articles of agreement of the oil trust are to be found printed in full, the court said: "That the nature of the agreement is such as to preclude the defendant from becoming a party to it, is, we think, too clear to require much consideration by us. In the first place, whether the agreement should be regarded as amounting to a partnership between the several companies, limited partnerships, and individuals who are parties to it, it is clear that its observance must subject the defendant to a control inconsistent with its character as a corporation. Under the agreement, all but seven of the shares of the capital stock of the company have been transferred by the real owners to the trustees of the trust, who hold them in trust for such owners; and being enjoined by the terms of the agreement to endeavor to have the 'affairs' of the several companies conducted in a manner most conducive to the interests of the holders of the trust certificates issued by the trust, the trustees have the right, in virtue of their apparent legal ownership and by the terms of the agreement, to select such directors of the company as they may see fit; nay more, may in fact select themselves. The law requires that a corporation should be controlled and managed by its directors in the interests of its own stockholders, and conformably to the purpose for which it was created by the laws of its State. By this agreement, indirectly it is true, but none the less effectually, the defendant is controlled and managed by the Standard Oil Trust, an association with its principal place of business in New York City, and organized for a purpose contrary to the policy of our laws. Its object was to establish a virtual monopoly of the business of producing petroleum, and of manufacturing, refining and dealing in it and all its products throughout the country, and by which it might not merely control the production, but the price at its pleasure. All such associations are contrary to the policy of our State, and void." See, also, to the same effect, National Harrow Co. *v.* Hench, 83· F. 36; 27 C. C. A. 349; Mallory *v.* Hanaur Oil Works, 86 Tenn. 602; and, in the case of the Distillers' and Cattle Feeders' Trust, State *v.* Nebraska Distilling Co., 29 Neb. 700; Bishop *v.* Am. Preservers Co., 157 Ill. 284; Am. Fire Ins. Co. *v.* State, 75 Miss. 24.

[1]Rafferty *v.* Baffalo City Gas Co., 56 N. Y. S. 288; 37 App. Div. 618.

[1]People *v.* Chicago Gas Trust Co., 130 Ill. 268. The court said: "Of what avail is it that any number of gas companies may be formed under the general incorporation law, if a giant trust company can be clothed with the power of buying up and holding the stock and property of such companies, and, through the control thereby attained, can direct all their operations and weld them into one huge combination? The several privileges or franchises intended to be exercised by a number of companies are thus vested exclusively in a single corporation. To create one corporation for the express purpose of enabling it to control all the corporations engaged in a certain kind of business, and particularly a business of a public character, is not only opposed to the public policy of the State, but it is in contravention of the spirit, if not the letter, of the constitution. That the exercise of the power attempted to be conferred upon the appellee company must result in the creation of a monopoly, results from the very nature of the power itself. If the privilege of purchasing and holding all the shares of the stock in all the gas companies of Chicago can be lawfully conferred upon appellee under the general incorporation act, it can be lawfully conferred upon any other corporation formed for the purpose of buying and holding all the shares of stock of said gas companies. The design of that act was, that any number of corporations might

be organized to engage in the same business, if it should be deemed desirable. But the business now under consideration could hardly be exercised by two or three corporations. Suppose that, after the appellee had purchased and become the holder of the majority of shares of stock of the four companies in Chicago, another corporation had been organized with the same object in view—that is to say, for the purpose of purchasing and holding a majority of the shares of the stock of the gas companies in Chicago, there being only four of such companies—what would there be for the corporation last formed to do? It could not carry out the object of its creation, because the stock it was formed to buy was already owned by an existing corporation. Hence, to grant to the appellee the privilege of purchasing and holding the capital stock of any gas company in Chicago, is to grant to it a privilege which is exclusive in its character. It is making use of the general incorporation law to secure a special privilege, immunity or franchise; it is obtaining a special charter under the cover and through the machinery of that law, for a purpose forbidden by the constitution. To create one corporation, that it may destroy the energies of all other corporations of a given kind, and suck their life-blood out of them, is not a 'lawful purpose.' " See, also, to the same effect, adopting the same argument, Distilling & Cattle-Feeding Co. *v.* People, 156 Ill. 448; National Harrow Co. *v.* Hench, 76 F. 667. It seems to be a well-settled proposition of American corporation law, that it is *ultra vires* for an ordinary corporation, without express authority, to purchase and hold the stock of other corporations. Franklin Co. *v.* Lewiston Sav. Bank, 68 Me. 43; Pierson *v.* McCurdy, 33 Hun, 520; Central R. R. Co. *v.* Penn. Ry. Co., 31 N. J. Eq. 475; Central R. R. Co. *v.* Collins, 40 Ga. 582; Buckeye Marble & Freestone Co. *v.* Harvey, 92 Tenn. 115; New Orleans F. & H. S. T. Co. *v.* Ocean Dry Dock Co., 28 La. Ann. 173; Franklin Bank *v.* Commercial Bank, 36 Ohio St. 350; Valley Ry. Co. *v.* Lake Erie Iron Co., 46 Ohio St. 44. But see Booth *v.* Robinson, 55 Md. 433; National Bank of Jefferson *v.* Tex. Investment Co., 74 Tex. 421. And see the very recent case of Rafferty *v.* Buffalo City Gas Co., 56 N. Y. S. 288; 37 App. Div. 618.

[1]Stockton *v.* Central R. R. Co. of N. J., 50 N. J. Eq. 52; *s. c.* 489. In this case the railroad company had leased all its rights, property, and franchises, including forty auxiliary roads, which were leased or otherwise controlled by it, to a foreign railroad corporation for 999 years, which had, by the acquisition of the control of other railroads, been developed into a huge combination of railroads, which furnished the carrying accommodations for the coal regions of Pennsylvania. The lease was held to be in restraint of trade, and equity would restrain the enforcement of the lease. See, also, Anheuser-Busch Brewing Association *v.* Houck, 88 Tex. 184; American Strawboard Co. *v.* Peoria Strawboard Co., 65 Ill. App. 502.

[2]Bi-spool Sewing Machine Co. *v.* Acme Mfg. Co., 153 Mass. 404; Holmes & Griggs Mfg. Co. *v.* Holmes & Wessell Metal Co., 127 N. Y. 252; Ardesco Oil Co. *v.* North Am. Oil, etc., Co., 66 Pa. St. 375.

[3]See Penn. Ry. Co. *v.* St. Louis, A. & T. H. R. R. Co., 118 U. S. 290, 630; Chicago Gaslight & Coke Co. *v.* People's Gaslight & Coke Co., 121 Ill. 530; Fietsam *v.* Hay, 122 Ill. 293; Small *v.* Minneapolis Electro-Matrix Co., 45 Minn. 264; State *v.* Nebraska Distilling Co., 29 Neb. 700.

[1]Coquard *v.* National Linseed Oil Co., 171 Ill. 480. See, to same effect, Trenton Potteries Co. *v.* Olyphant (N. J. Eq. '99), 43 A. 723, modifying decree in *s. c.* 56 N. J. Eq. 680. See Cravens *v.* Carter-Crume Co., 92 Fed. 479; 34 C. C. A. 479.

[2]As to which, see *post,* next section.

[1]The United States Statute—26 Stat. at Large, 209, Ch. 647.

"An act to protect trade and commerce against unlawful restraints and monopolies.

Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments in the discretion of the court.

Sec. 2. Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments in the discretion of the court."

The development of the law in New York State is peculiarly instructive, as showing the strength of the forces which compel the formation of the prohibited trade combinations.

Laws of 1893, ch. 716:—

Sec. 1. Every contract or combination, in the form of trust or otherwise, made after the passage of this act, whereby competition in the State of New York in the supply or the price of any article or commodity of common use in said State for the support of life and health may be restrained or prevented for the purpose of advancing prices, is hereby declared illegal.

Sec. 3, Added by L. 1896, Ch. 267.

Sec. 3. Every corporation or officer thereof, that shall make any contract, arrangement or agreement, or shall enter into any combination or conspiracy for the purpose of restraining or preventing competition in the supply or price of any article or commodity in common use in this State, or that shall attempt or actually conduct any business in this State pursuant to any such contract, arrangement, agreement or combination, wherever the same may be made, or shall in any manner in this State engage or aid in carrying out or executing the agreements contained in any such contract or arrangement, wherever the same may be made, shall be deemed guilty of a misdemeanor. The attorney-general may, in addition to the power now conferred by

law, bring an action in the name and in behalf of the people of the State against one or more trustees, directors, managers or other officers of a corporation, or against any corporation, foreign or domestic, to restrain them or either of them from carrying out in this State any such contract, combination or business in this State, where such contract, combination or business is threatened, or there is good reason to apprehend that the same may be made."

Act of 1897:—

Sec. 1. Every contract, agreement, arrangement or combination whereby a monopoly in the manufacture, production or sale in this State of any article or commodity of common use is or may be created, established or maintained, or whereby trade or commerce in this State in any such article or commodity is or may be restricted, or whereby competition in this State in the supply or price of any such article or commodity is or may be restrained or prevented, or whereby for the purpose of creating, establishing or maintaining a monopoly within this State of the manufacture, production or sale of any such article or commodity, the free pursuit of any lawful business, trade or occupation is or may be restricted or prevented, is hereby declared to be against public policy, illegal and void.

In Alabama, Illinois, Mississippi, Missouri, New Mexico, Tennessee, pools, trusts, or combinations to regulate or control prices of products, goods, wares or merchandise are prohibited.

The Louisiana statute declares illegal all trusts and combinations, which restrain trade or commerce. The South Dakota statute prohibits all trusts and combinations, "tending to prevent a free, fair and full competition in the production, manufacture, or sale of any article or commodity of domestic growth, use or manufacture" or to advance the price of the same beyond the reasonable cost of production.

The Iowa statute declares it to be a misdemeanor, and punishable as such, in accordance with other provisions of the statute, for any corporation, association, partnership or individual to become a member or party to any trust, agreement or contract, to regulate the price of any article of merchandise, or the control of the joint business by the issue of trust certificates, and the statute further declares that the purchaser from such illegal combination or trust of any article, the sale of which is the occasion for the formation of the trust or combination, may plead this act as a defense to the suit for the purchase price; and that any corporation, entering into such a trust or combination, thereby forfeits its charter and corporate rights and franchises.

The Michigan statute declares "all contracts, agreements understandings and combinations made," "the purpose or object or intent of which shall be to limit, control, or in any manner to restrict or regulate the amount of production or the quantity of any article or commodity to be raised or produced by" any branch of business or labor, "or to enhance, control, or regulate the market price thereof, or in any manner to prevent or restrict free competition in the production or sale of any such article or commodity, shall be utterly illegal and void, and every such contract," etc., "shall constitute a criminal conspiracy," and punishable as such in accordance

with the other provisions of the statute. Any corporation entering into and remaining in such a trust and combination shall forfeit its charter. There are two exceptions to the operation of the statute the statute does not apply to, *first,* contracts for the sale of the "good-will of a trade or business;" or *secondly,* to "agricultural products or live-stock while in the hands of the producer or raiser, nor to the services of laborers, or artisans who are formed into societies or organizations for the benefit and protection of their members." A Kansas statute prohibits combinations to prevent competition among persons in buying and selling live-stock.

I believe a careful reading of all of these statutes in the original will confirm the statement of the text, that the common law has been changed in every case in regard to the actionable wrong committed by the creation of or entrance into a trust or combination in restraint of trade, and that most of the statutes have prohibited all contracts and combinations in restraint of trade and competition, whether their restraint was reasonable or unreasonable.

It may be pertinent to add that the author does not profess to have kept up with all the changes in the anti-trust legislation of the States, or to give here an exhaustive analysis of them all. He is concerned only in the full illustration of the principles which underlie them all.

[1]In re Grice, 79 Fed. 627.

[2]In re Grice, 79 Fed. 627.

[3]Queen Ins. Co. *v.* State, 86 Tex. 250.

[1]§§ 109, 110.

[2]Brett *v.* Ebel, 51 N. Y. S. 573; 29 App. Div. 256. But see *contra,* Harding *v.* Am. Glucose Co. (Ill. 1899), 55 N. E. 577.

[3]There have been expressions of opinion by legislators that they want to prohibit just such transactions, in order to prevent the growth, by the purchases of the good-will of rivals, of huge virtual monopolies.

[1]People *v.* Sheldon, 139 N. Y. 251.

[1]United States *v.* Trans-Missouri Freight Association, 166 U. S. 290.

[1]United States *v.* Trans-Missouri Freight Assn., 58 F. 58; 7 C. C. A. 15. A similar agreement between railroads was sustained by the Supreme Court of New Hampshire, in which the court said in part:—

"For the lessons of experience, as well as the deductions of reason, amply demonstrate that the public interest is not subserved by competition which reduces the rates of transportation below the standard of fair compensation; and the theory which formerly obtained that the public is benefited by unrestricted competition between railroads has been so emphatically disproved by the results which have generally

followed its adoption in practice that the hope of any permanent relief from excessive rates through the competition of a parallel or rival road may, as a rule, be justly characterized as illusory and fallacious. Upon authority, also, arrangements and contracts between competing railroads, by which unrestrained competition is prevented, do not contravene public policy." Manchester & L. R. Co. *v.* Concord R. R. Co., 66 N. H. 100. See, also, Herriman *v.* Menzies, 115 Cal. 16, in which an association of stevedores was sustained as not unduly restricting the business of stevedoring, in contravention of public policy, although it was formed to regulate the charges, and prohibit the members from doing work at a lower figure.

[1]United States *v.* Joint Traffic Association, 171 U. S. 505. In this case, Mr. Justice Peckham said, *inter alia:*—

"The question really before us is whether Congress, in the exercise of its right to regulate commerce among the several States, or otherwise, has the power to prohibit, as in restraint of interstate commerce, a contract or combination between competing railroad corporations entered into and formed for the purpose of establishing and maintaining interstate rates and fares for the transportation of freight and passengers on any of the railroads which are parties to the contract or combination, even though the rates and fares thus established are reasonable. Such an agreement directly affects the cost of transportation of commodities, and commerce consists, among other things, of the transportation of commodities, and if such transportation be between States it is interstate commerce. The agreement affects interstate commerce by destroying competition and by maintaining rates above what competition might produce.

"If it did not do that, its existence would be useless, and it would soon be rescinded or abandoned. Its acknowledged purpose is to maintain rates, and if executed, it does so. It must be remembered, however, that the act does not prohibit any railroad company from charging reasonable rates. If in the absence of any contract or combination among the railroad companies the rates and fares would be less than they are under such contract or combination, that is not by reason of any provision of the act which itself lowers rates, but only because the railroad companies would, as it is urged, voluntarily and at once inaugurate a war of competition among themselves, and thereby themselves reduce their rates and fares.

"Has not Congress with regard to interstate commerce and in the course of regulating it, in the case of railroad corporations, the power to say that no contract or combination shall be legal which shall restrain trade and commerce by shutting out the operation of the general law of competition? We think it has."

In this case, as in the case of the Trans-Missouri Freight Association the opinion was delivered by a divided court; in the Trans-Missouri case, four justices dissenting, and in the Joint-Traffic case, three justices, dissenting and one taking no part in the decision. In both cases, the opinion was concurred in by only five justices, a bare majority of the court.

[1]Greer *v.* Payne, 4 Kans. App. 153.

[1]Cummings *v.* Union Bluestone Co., 15 App. Div. 602; 44 N. Y. S. 787; People *v.* Duke, 44 N. Y. S. 336; 11 N. Y. Cr. R. 472; 19 Misc. Rep. 292.

[2]Downing *v.* Lewis (Neb.), 76 N. W. 900.

[3]State *v.* Portland Nat. Gas & Oil Co. (Ind. '99), 53 N. E. 1089.

[4]Beechley *v.* Mulville, 102 Iowa, 602; State ex rel. Crow *v.* Fireman's Fund Assn. (Mo. '99), 52 S. W. 595; State *v.* Phipps, 50 Kans. 609; Am. Fire Ins. Co. *v.* State, 75 Miss. 24. But see *contra,* Ætna Ins. Co. *v.* Commonwealth (Ky. '99), 51 S. W. 624; Queen Ins. Co. *v.* State, 86 Tex. 250.

[5]People *v.* Milk Exchange, 145 N. Y. 267; Ford *v.* Chicago Milk Shippers Assn., 155 Ill. 166; Harding *v.* American Glucose Co. (Ill. '99), 55 N. E. 577; Merz Capsule Co. *v.* U. S. Capsule Co. (C. C.), 67 Fed. 414 (same as to the executory agreement to combine); State *v.* Buckeye Pipe Line Co. (Ohio, 1900), 56 N. E. 464; State *v.* Solar Refining Co. (Ohio), 56 N. E. 464; State *v.* Standard Oil Co. (Ohio), 56 N. E. 464.

[1]Meredith *v.* New Jersey Zinc & Iron Co., 55 N. J. Eq. 211.

[2]Coquart *v.* National Linseed Oil Co., 171 Ill. 480.

[3]Oakdale Mfg. Co. *v.* Garst, 18 R. I. 484.

[1]166 U. S. 290.

[1]See *ante,* § 112.

[2]People *v.* Duke, 44 N. Y. S. 336; 11 N. Y. Cr. R. 472; 19 Misc. Rep. 292. In a recent case, it has been held in New York, that the contract of a manufacturer to give his customers a rebate, if they do not sell his goods below the price which the manufacturer has fixed from time to time, did not violate any provision of the New York anti-trust law. Walsh *v.* Dwight, 40 App. Div. N. Y. 513; 58 N. Y. S. 91.

[3]Welch *v.* Phelps & Bigelow Windmill Co., 89 Tex. 653. And see, to same effect, In re Green, 52 Fed. 104; In re Corning, 51 F. 205; United States *v.* Greenhut, 51 F. 205; Dueber Watch Case Mfg. Co. *v.* E. Howard Watch and Clock Co., 14 C. C. A. 14; 66 F. 637.

[4]Columbia Carriage Co. *v.* Hatch (Tex. Civ. App.), 47 S. W. 288.

[1]Prescott & A. C. Ry. Co. *v.* Atchison, T. & S. F. Ry. Co., 73 Fed. 438.

[2]John D. Park & Sons Co. *v.* Nat. Wholesale Druggists Association, 50 N. Y. S. 1064.

[3]See *post,* § 129.

[4]Edison Electric Light Co. *v.* Sawyer Man. Electric Co., 53 F. 592; 3 C. C. A. 605; Strait *v.* National Harrow Co., 51 F. 819; Soda Fountain Co. *v.* Green, 69 F. 333; Columbia Wire Co. *v.* Freeman Wire Co., 71 F. 302; disapproving of National Harrow Co. *v.* Quick, 67 F. 130, *contra.*

[1]National Harrow Co. *v.* Hench, 66 Fed. 667; 83 Fed. 36; 27 C. C. A. 349; United States *v.* Patterson, 59 Fed. 280; National Harrow Co. *v.* E. Bement & Sons, 47 N. Y. S. 462; 21 App. Div. (N. Y.) 290. But see Columbia Wire Co. *v.* Freeman Wire Co., 71 F. 302.

[2]Schulten *v.* Bavarian Brewing Co. (Ky.), 28 S. W. 504; Delz *v.* Winfree, 6 Tex. Civ. App. 11.

[3]Jackson *v.* Stanfield, 137 Ind. 592; Bohn Mfg. Co. *v.* Hollis, 54 Minn. 223.

[1]Cote *v.* Murphy, 159 Pa. St. 420; Buchanan *v.* Kerr, 159 Pa. St. 433.

[2]United States *v.* Greenhut, 50 F. 469; *s. c.* 51 F. 205; In re Corning, 51 F. 205; In re Greene, 52 F. 104; United States *v.* Nelson, 52 F. 646; United States *v.* Patterson, 55 F. 605.

[3]See cases in preceding note.

[1]United States *v.* Patterson, 59 F. 280.

[2]Greer Mills & Co. *v.* Stoller, 77 F. 1; In re Grice, 79 F. 627.

[3]Ford *v.* Chicago Milk Shippers' Assn., 155 Ill. 166; Bishop *v.* Am. Preservers Co., 157 Ill. 284.

[4]The Charles E. Wisewall, 74 Fed. 802; 86 Fed. 671; 30 C. C. A. 339; Brewster *v.* Miller (Ky.), 41 S. W. 301.

[5]Levin *v.* Chicago Gaslight & Coke Co., 64 Ill. App. 393.

[1]City of Chicago *v.* Netcher (1899), 55 N. E. 707.

[1]These statutes have been repealed and labor organizations are now in England lawful combinations.

[2]Boot and shoe makers of Philadelphia (1806) and journeyman cord-wainers of Pittsburg (1811), both printed in pamphlet.

[1]People *v.* Melvin, 2 Wheeler Crim. Cas. 262; People *v.* Fisher, 14 Wend. 1.

[2]Com. *v.* Carlisle, Brightley, 36, 40; Com. *v.* Hunt, 4 Met. 111; Boston Glass Mfg. Co. *v.* Binney, 4 Pick. 425; Bowen *v.* Matheson, 14 Allen, 499; Master Stevedores *v.* Walsh, 2 Daly, 1; Carew *v.* Rutherford, 106 Mass. I, 13; Snow *v.* Wheeler, 113 Mass. 179.

[3]In the case of Master Stevedores *v.* Walsh, *supra,* the reader will find a most thorough exposition of the English cases and statutes, bearing on this subject. This case, however, only holds that it is not criminal for workmen to combine to control the terms of their own hiring, and expressly distinguishes such a combination from one in which the purpose is to control the business of the employer in other matters, not affecting the terms of their own hiring; as, for example, the prevention of the employment of non-union men.

[1]In Massachusetts, the statute reads "for the purpose of improving in any lawful manner the condition of any employees in any lawful trades or employments, either in respect to their employment," etc. In Maryland, "to promote the well-being of their every-day life, and for mutual assistance in securing the most favorable conditions for the labor of their members," etc. In Iowa, "for the regulation, by lawful means, of prices of labor, of hours' work, and other matters, pertaining to industrial pursuits," etc. In Michigan, "for the improvement of their several social and material interests, the regulation of their wages, the laws and conditions of their employment, the protection of their joint and individual rights in the prosecution of their trades or industrial avocations," etc. In all of the statutes, provisions are made for aid to the sick and unemployed, and for death benefits, and other benevolent purposes, which in nowise concern us in the present connection.

[2]Acts of 1886, ch. 567.

[1]Master Stevedores *v.* Walsh, 2 Daly, 1; People ex rel. Baker *v.* Coachmen's Union Ben. Assn., 24 N. Y. S. 114; *s. c.* 4 Misc. Rep. 424; Merschiem *v.* Musical Mut. Protective Union, 8 N. Y. S. 702; *s. c.* 24 Abb. N. C. 252; People ex rel. Deverell *v.* Musical Mut. Protective Union, 118 N. Y. 101.

[2]Perkins *v.* Heert, 39 N. Y. S. 223; 5 App. Div. 335; 158 N. Y. 306.

[3]§ 112.

[1]United States *v.* Debs, 62 Fed. 832; 64 Fed. Rep. 724; 65 Fed. 210; In re Debs, 158 U. S. 564.

[2]Moore *v.* Bennett, 140 Ill. 69.

[3]Milwaukee Masons & Builders' Assn. *v.* Niezerowski, 95 Wis. 129. See, also, Mapstick *v.* Range, 9 Neb. 390.

[1]Longshore Printing & Pub. Co. *v.* Howell, 26 Oreg. 527.

[2]The Pennsylvania statute authorizes workmen who are members of a union to strike in combination, whenever the employer fails to come to the terms upon which the members are alone allowed by the rules of the union to work. The New Jersey statute declares it to be lawful "for any two or more persons to unite, combine, or bind by oath, covenant," etc., "to persuade, advise, or encourage by peaceable means any person or persons to enter into any combination for or against leaving or entering into the employment of any person or persons or corporations." The Colorado legislature

copied the New Jersey statute, and added a declaration that it shall be lawful for workmen to combine to secure increase of wages, shorter hours of labor, and to promote their welfare as workmen in any other way, provided they do not employ unlawful means, such as threats, boycott, violence, etc., to accomplish the purpose of the combination.

[3]Mayer *v.* Journeymen Stone Cutters Assn., 47 N. J. Eq. 519.

[1]But see Farmer's Loan & Trust Co. *v.* Northern Pac. Ry. Co., 60 Fed. 803, in which it was held there was nothing in the Congressional authority (act of 1886) for the incorporation of national trades-union to authorize combinations and conspiracies of interstate railroad employees to quit in a body the service of the railroad, with the intent to embarrass the business of the railroad, and the ulterior purpose of enforcing their demands againmst the employers. But see *contra,* Arthur *v.* Oakes, 63 Fed. 310; 11 C. C. A. 209.

[2]See to this effect, Cote *v.* Murphy, 159 Pa. St. 420.

[1]§ 104.

[1]See Longshore Printing & Pub. Co. *v.* Howell, 26 Oreg. 527; Arthur *v.* Oakes, 63 Fed. 310; 11 C. C. A. 209; Perkins *v.* Rogg, 28 Weekly Law Bul. 32; Rogers *v.* Evarts, 17 N. Y. Sup. 264. And in the last case, it is expressly held to be lawful for the union to sustain the strike, by providing out of its funds for the payment of the expenses of the strikers.

[1]Arthur *v.* Oakes, 63 Fed. 310, 317, 321; *s. c.* 11 C. C. A. 209; Farmers' Trust Co, *v.* N. P. R. R., 60 Fed. 803; Mapstrick *v.* Range, 9 Neb. 390 (2 N. W. 739).

[1]Mogul S. S. Co. *v.* McGregor, L. R. 23 Q. B. D. 598.

[1]I have in these quotations from the English case, interpolated, in brackets, the words "or labor," in order to emphasize the soundness of this judicial explanation of conspiracy in its application to combinations of workmen in their contest with their employers. This case is more fully presented and discussed in a preceding section, § 110, p. 372, *et seq.* As an authority in England, this definition of conspiracy has been very materially modified by the more recent case of Allen *v.* Flood, (1898) A. C. 1, which is very fully set forth in the next section.

[1]See *ante,* §§ 96, 97.

[1]See, also, *post,* same section, cases of boycott of one tradesman by associations of tradesmen.

[1]See *ante,* § 104.

[2]Bowen *v.* Hall, L. R. 6 Q. B. D. 333; Haskins *v.* Royster, 70 N. C. 355; Jones *v.* Stanley, 76 N. C. 355; Doremus *v.* Hennesy, 62 Ill. App. 391. Lumley *v.* Gye, 2 E. & B. 216, is held to be the leading English case in support of this proposition. In Lally *v.*

Cantwell, 40 Mo. App. 44 and Dannenberg *v.* Ashley, 10 Ohio C. C. Rep. 558; 1 O. C. D. 40, it was held that a third person, who maliciously procured the discharge of a servant, was actionable civilly. In Exchange Tel. Co. *v.* Gregory, 1 Q. B. 147, a third person was held to be liable for inducing a subscriber of the plaintiffs to violate his agreement not to communicate to non-subscribers the information which was supplied to him by the plaintiffs. In Graham *v.* St. Charles Street Ry. Co., 47 La. Ann. 214, 1656, the foreman of a street railway was held to be liable to the plaintiff, because in hiring and discharging men, the foreman discriminated against those who traded, or were disposed to trade, at plaintiff's grocery. The malicious intent to injure plaintiff's business seems to have been clearly made out in this case, without any other motive, which might have made his action appear at all reasonable. In International & G. M. Ry. Co. *v.* Greenwood, 2 Tex. Civ. App. 76, it was held to be unlawful for a railroad to prohibit its present employees from patronizing a certain boarding-house, even though the alleged motive was to avoid troublesome litigation with the proprietor of the boarding house or interference with its own regulations, as long as the necessity of such regulations is not made apparent. But the court conceded to the railroad the right, in employing workmen, to stipulate with them that they shall not patronize the boarding-house in question, since it was the undoubted right of the railroad to choose its own employees, and reject those who will not comply with the imposed conditions of employment.

[1]Thus in Chambers *v.* Baldwin, 91 Ky. 121, the defendant, in the pursuit of his desire to purchase certain goods, which a third party had already contracted to buy from plaintiff, maliciously, and with the intent to injure the plaintiff, induced this third party to break his contract with the plaintiff. The court held that no actionable wrong had been committed by the defendant. The same conclusion was reached by the same court in Bourlier *v.* Macauley, 91 Ky. 135, where a theater manager had maliciously induced an actress to leave another theater, where she was performing under a contract of service. The actress was, of course, liable, but not the rival theater manager. In State *v.* Hoover, 107 N. C. 795, the court denied to the plaintiff any right of action against the defendant for inducing the plaintiff's tenant to break his contract of lease, and abandon the farm which he held under lease. The plaintiff's attorney endeavored to secure a judgment against the defendant on the ground that he had violated the statute which prohibited any one from enticing away a servant, holding that the tenant was a servant, inasmuch as one of the terms of the lease was that he should do some work for the plaintiff. This contention the court denied. In Glencoe Sand & Gravel Co. *v.* Hudson Brothers Commission Co., 138 Mo. 439, it was held that an action would not lie against a third person for inducing another to break his contract with plaintiff, where the contractual relation was not that of master and servant. In Robinson *v.* Texas Pine Land Assn. (Tex. Civ. App. 1897), 40 S. W. 843, the defendant who kept a truck-store and sold the same kind of goods as the plaintiff did, and who paid the employees in non-transferable orders on its store, threatened to discharge such employees if they traded at plaintiff's stores, and notified them that these orders or pay-checks would not be honored if they were transferred to plaintiff. These acts of the defendant were held to be lawful, and to give to plaintiff no action for damages. A similar ruling was made on a similar statement of facts in Payne *v.* Western, etc., Ry. Co., 13 Lea, 507. It was also held to be lawful for an employer to prohibit his employees from renting plaintiff's houses, in Heywood *v.* Tillson, 75 Me.

225. And in Raycroft *v.* Tayntor, 68 Vt. 219, where the superintendent of a stone quarry maliciously procured the discharge of an employee by refusing to let the employer take stone from the quarry as long as he retained the employee in his employ, he was held to be guilty of no actionable wrong against such employee.

[1]1898, A. C. 1, 25.

[1]Benton *v.* Pratt, 2 Wend. 385; Rice *v.* Manley, 66 N. Y. 82; Angle *v.* Chicago & St. Paul &c. Ry. Co., 151 U. S. 1; Lally *v.* Cantwell, 40 Mo. App. 524; Boyson *v.* Thorn, 98 Cal. 582; Bourlier *v.* Macauley, 91 Ky. 135, 140.

[2]§ 114.

[1]See Reg. *v.* Parnell, 14 Cox C. C. 508.

[1]§§ 107, 108.

[1]§§ 108, 110-112.

[2]See *ante,* § 114.

[1]U. S. *v.* Joint Traffic Association, 171 U. S. 505.

[2]People *v.* Sheldon, 139 N. Y. 251.

[1]For cases, involving more or less of these reprehensible and unlawful trespasses upon the rights of others, see Pettibone *v.* U. S., 148 U. S. 197; Regina *v.* Druitt, 10 Cox C. C. 592; U. S. *v.* Workingmen's Amalgamated Council, 54 Fed. 994; Hamilton-Brown Shoe Co. *v.* Saxey, 131 Mo. 212; Mackall *v.* Ratchford, 82 Fed. 41; Consolidated Steel & Wire Co. *v.* Murray, 80 Fed. 811; Wick China Co. *v.* Brown, 164 Pa. St. 449; O'Neill *v.* Behanna, 182 Pa. St. 236; People *v.* Wilzig, 4 N. Y. Crim. Rep. 403.

[1]See Old Dominion S. S. Co. *v.* McKenna, 30 Fed. R. 48; People *v.* Kostka, 4 N. Y. Cr. Rep. 429; Brace *v.* Evans, 3 R. & Corp. L. J. 561; Murdock *v.* Walker, 152 Pa. St. 595; O'Neill *v.* Behanna, 182 Pa. St. 236; Sherry *v.* Perkins, 147 Mass. 212; Vegelahn *v.* Guntner, 167 Mass. 92.

[1]L. R. 23 Q. B. D. 598. See *ante,* §§ 110, 114.

[1]State *v.* Stewart, 59 Vt. 273; State *v.* Glidden, 55 Conn. 46; Casey *v.* Cincinnati Typo. Union, 45 Fed. 135; Moores & Co. *v.* Bricklayers' Union (Cincinnati Sup. Ct.), 23 Wkly. L. B. (O.) 48; Barr *v.* Essex Trades Council, 53 N. J. Eq. 101; Old Dominion S. S. Co. *v.* McKenna, 30 Fed. 48; Lucke *v.* Clothing Cutters & Trimmers' Assembly, 77 Md. 396.

[1]Crump *v.* Com., 84 Va. 927; Hopkins *v.* Oxley Stave Co., 83 Fed. 912.

[2]Thomas *v.* Cincinnati, N. O. & T. Ry. Co., 62 Fed. 803; United States *v.* Cassidy, 67 Fed. 698; In re Charge to Grand Jury, 62 Fed. 828; United States *v.* Debs, 63 Fed. 436; Toledo A. A. & N. M. Ry. Co. *v.* Pennsylvania Co., 54 Fed. 730; Clune *v.* United States, 159 U. S. 590.

[3]Gatzow *v.* Buening (Wis. 1900), 81 N. W. 1003.

[4]See, also, on the same lines, except that it was a boycott, directed against a particular person. Ertz *v.* Produce Exchange Co. (Minn. 1900), 81 N. W. 737.

[1]Com. *v.* Hunt, 4 Met. 111; Bowen *v.* Matheson, 14 Allen, 499.

[2]Longshore Printing Co. *v.* Howell, 26 Oreg. 527.

[3]Old Dominion S. S. Co. *v.* McKenna, 30 Fed. 48; Casey *v.* Cincinnati Typo. Union, 45 Fed. 135; Lucke *v.* Clothing Cutters' and Trimmers' Assembly, 77 Md. 396; State *v.* Dyer, 67 Vt. 690; Callan *v.* Wilson, 127 U. S. 540; Curran *v.* Gale, 22 N. Y. S. 826; 2 Misc. Rep. 553; *s. c.* 152 N. Y. 33. There are many other cases, in which attempts have been made to prevent non-union workmen from obtaining employment, or retaining their positions, but they are complicated by threats and fears of physical violence, opprobrious epithets, and by annoying pursuit by the union men. These cases have already been cited in connection with a statement of the law in regard to the use of unlawful means.

[4]Curran *v.* Gale, 152 N. Y. 33.

[1]Reg. *v.* Hewitt, 5 Cox C. C. 162; Rex *v.* Bykerdike, 1 Moody & R. 179; Perham's Case, 5 H. & M. 30; Shelbourne *v.* Oliver, 13 L. T. R. [n. s.] 630.

[1](1898) A. C. 1. To the same effect, Connor *v.* Kent, 2 Q. B. 545.

[2]See *ante,* §§ 110, 114.

[3]Allen *v.* Flood, 1898, A. C. 1, 128.

[1]The following is a quotation from the confirmatory opinion of Lord Watson, p. 78, Allen *v.* Flood:—

"It is, in my opinion, the absolute right of every workman to exercise his own option with regard to the persons in whose society he will agree to continue to work. It may be deplorable that feelings of rivalry between different associations of workingmen should ever run so high as to make members of one union seriously object to continue their labor in company with members of another trade union; but so long as they commit no legal wrong, and use no means which are illegal, they are at perfect liberty to act upon their own views."

There were other more elaborate opinions dissenting from the prevailing opinion of Lord Herschell, but to the American student the following quotation from the opinion of Lord Cave (p. 36), seems to be the most important:—

"Bearing in mind the dicta of Lord Holt and Sir William Erle, which have been already cited, and remembering how men earn their livelihood by almost insensible gradations, from disposing of their labor only, through disposing of goods which owe what value they possess solely to the labor which has been spent upon them, up to disposing of goods in which the labor spent upon them forms a continually decreasing portion of their value, it seems impossible at the present day to hold that there is one law for the comparatively rich trader, and another for the comparatively poor working man living by his labor, and I, therefore, answer the first part of the question put to us by saying that in my opinion Allen, in inducing their employers to dismiss the respondents from their employment, was guilty of a violation of their right to freely dispose of their labor without molestation, and that this is an actionable wrong, unless he can justify it by showing that he had some lawful cause or excuse for what he did. * * * Now in the present case, disregarding all questions as to whether Allen couched his inducement in the form of a threat or of advice, and as to whether he correctly or incorrectly reported to the employers what had taken place between himself and the boiler-makers, there remains the fact that Allen induced their employers to cease employing the respondents, not because the boiler-makers wished to do, or could do, the work on which the respondents were then employed, but because the respondents had been previously guilty of doing iron work in Mills & Knight yards. His motive therefore, was not to secure the work they were then doing for the boiler-makers, but to punish the respondents for what they had previously done, and, according to Edmonds and Halkett when they spoke about it not being right to visit Mills & Knight's sins on the Glengall Iron Company, Allen said that the boiler-makers would be called out from any yard the respondents went to, and that they (the respondents) would not be allowed to work anywhere in London River. Now, although according to the principles of the Mogul case (23 Q. B. D. 598) the action of Allen might have been justified on the principles of trade competition, if it had been confined to the time when the respondents were doing ironwork, and were therefore acting in competition with the boiler-makers, it appears to me that soon as he overstepped these limits and induced their employers to dismiss them by way of punishment, his action was without just cause or excuse, and consequently malicious within the legal meaning of the term. * * * If this is not malicious, I ask where the line is to be drawn. Might Allen lawfully have carried out his threat, and with impunity have procured the dismissal of the respondents from every yard in London by way of punishment, and not in the way of competition?"

[1]Doremus *v.* Hennessy (Ill.), 52 N. E. 924; rehearing denied, 54 N. E. 524.

[1]Doremus *v.* Hennessy (Ill.), 52 N. E. 924, 925.

[1]Doremus *v.* Hennesy (Ill. '99), 54 N. E. 524.

[2]Fisher *v.* Schuri, 73 Wis. 370. The petition, which was held to state a good cause of action, charged this combination of church members with "unlawfully, maliciously and without just cause * * * conspiring, conniving and contriving to injure plaintiff," etc.

[1]Bohn Mfg. Co. *v.* Hollis, 54 Minn. 223.

[2]Jackson *v.* Stanfield, 137 Ind. 592.

[3]Olive *v.* Van Patten, 7 Tex. Civ. App. 630.

[4]Dueber Watch-case Mfg. Co. *v.* Howard Watch & Clock Co., 24 N. Y. S. 647; 3 Misc. Rep. 582. This same dispute gave rise to an action in the Federal courts, but the court denied relief on the ground that the case did not involve any question relating to interstate commerce. *S. c.* 55 Fed. 851.

[5]Van Horn *v.* Van Horn, 56 N. J. L. 318; Murray *v.* McGarigle, 69 Wis. 483.

[1]Delz *v.* Winfree, 80 Tex. 400.

[2]Schulten *v.* Bavarian Brewing Co., 96 Ky. 224; Brewster *v.* Miller (Ky. 1897), 41 S. W. 301.

[3]Macauley *v.* Tierney, 19 R. I. 255.

[4]Bradley *v.* Pierson, 148 Pa. St. 502.

[1]Blumenthal *v.* Shaw, 77 Fed. 954; 23 C. C. A. 590.

[1]See, *ante,* § 60.

[2]See, *post,* § 120. See *contra* State *v.* Roby, 142 Ind. 168; State ex rel. Matthews *v.* Forsythe, 147 Ind. 466; Wooten *v.* State, 23 Fla. 335; State *v.* Donovan (Nev.), 15 Pac. 783.

[1]Thus it was lawful at common law to bet that A. has purchased a wagon of B. (Good *v.* Elliott, 3 T. R. 693); or to bet on a cricket-match. Walpole *v.* Saunders, 16 E. C. L. R. 276. See, also, generally, in support of the position taken above, Sherborne *v.* Colebach, 2 Vent. 175; Hussey *v.* Crickell, 3 Campb. 168; Grant *v.* Hamilton, 3 M. L. 100; Cousins *v.* Mantes, 3 Taunt. 515; Johnson *v.* Lonsley, 12 C. B. 468; Dalby *v.* India Life Ins. Co., 15 C. B. 365; Hampden *v.* Walsh, L. R. 12 B. D. 192.

[2]Thus, wagers are void, which rest upon the result of an illegal game (Brown *v.* Leeson, 2 H. Bl. 43); which involve the abstinence from marriage (Huntley *v.* Rice, 10 East. 22); which refer to the expected birth of an illegitimate child (Ditchburn *v.* Goldsmith, 4 Campb. 152); or to the commission of adultery. Del Costa *v.* Jones, Cowp. 729. See also, to the same effect, Shirley *v.* Sankey, 2 Bos. & P. 130; Etham *v.* Kingsman, 1 B. & Al. 684.

[3]Bunn *v.* Rikes, 4 Johns. 426; Campbell *v.* Richardson, 10 Johns. 406; Dewees *v.* Miller, 5 Harr. 347; Trenton Ins. Co. *v.* Johnson, 4 Zabr. 576; Dunman *v.* Strother, 1 Tex. 89; Wheeler *v.* Friend, 22 Tex. 683; Monroe *v.* Smelley, 25 Tex. 586; Grant *v.* Hamilton, 3 McLean (U. S. C. C.), 100; Smith *v.* Smith, 21 Ill. 244; Richardson *v.*

Kelley, 85 Ill. 491; Petillon *v.* Hipple, 90 Ill. 420; Carrier *v.* Brannan, 3 Cal. 328; Johnson *v.* Hall, 6 Cal. 359; Johnson *v.* Russell, 37 Cal. 670.

[4]See Lewis *v.* Littlefield, 15 Me. 233; McDonough *v.* Webster, 68 Me. 530; Gilmore *v.* Woodcock, 69 Me. 118; Babcock *v.* Thompson, 3 Pick. 446; Ball *v.* Gilbert, 12 Met. 399; Sampson *v.* Shaw, 101 Mass. 150; Perkins *v.* Eaton, 3 N. H. 152; Clark *v.* Gibson, 12 N. H. 386; Winchester *v.* Nutter, 52 N. H. 507; Collamer *v.* Day, 2 Vt. 144; Tarlton *v.* Baker, 18 Vt. 9; Phillips *v.* Ives, 1 Rawle, 36; Brua's Appeal, 5 Sm. 294.

[1]1 Rev. Stats. N. Y. 661, § 8.

[2]Similar legislation is to be found in New Hampshire, Virginia, West Virginia, Wisconsin, Missouri, Illinois, Ohio and Iowa, and other States.

[3]See, *post,* § 178.

[1]A Missouri statute, which made it a criminal offense to make these option contracts, was held to be constitutional. State *v.* Gritzner, 134 Mo. 512. See to same effect, Wolsey *v.* Neely, 62 Ill. App. 141.

[2]See *ante,* § 107.

[1]"I have always thought, and shall continue to think until I am told by the House of Lords that I am wrong, that if a man sells goods to be delivered on a future day, and neither has the goods at the time, nor has entered into any prior contract to buy them, nor has any reasonable expectation of receiving by assignment, but means to go into the market and to buy the goods which he has contracted to deliver, he cannot maintain an action on such contract. Such a contract amounts, on the part of the vendor, to a wager on the price of the commodity, and is attended with the most mischievous consequences." Lord Tenterden in Bryan *v.* Lewis, Req. & Moody, 386. See, also, Longmer *v.* Smith, 1 B. & C. 1.

[2]"I have always entertained considerable doubt and suspicion as to the correctness of Lord Tenterden's doctrine in Bryan *v.* Lewis. It excited a good deal of surprise in my mind at the time, and when examined, I think it is untenable. I cannot see what principle of law is at all affected by a man's being allowed to contract for the sale of goods, of which he has not possession at the time of the bargain, and has no reasonable expectation of receiving. Such a contract does not amount to a wager, inasmuch as both the contracting parties know that the goods are not in the vendor's possession; and even if it were a wager, it is not illegal, because it has no necessary tendency to injure third parties." Baron Parke in Hibblewhite *v.* McMorine, 5 M. & W. 58. See Mortimer *v.* McCallan, 6 M. & W. 58; Wells *v.* Porter, 3 Scott, 141.

[3]Head *v.* Goodwin, 37 Me. 181; Rumsey *v.* Berry, 65 Me. 570; Lewis *v.* Lyman, 22 Pick. 437; Thrall *v.* Hill, 110 Mass. 328; Heald *v.* Builders' Ins. Co., 111 Mass. 38; Smith *v.* Atkins, 18 Vt. 461; Noyes *v.* Spaulding, 27 Vt. 420; Hull *v.* Hull, 48 Conn. 250; Hauton *v.* Small, 3 Sand f. 230; Currie *v.* White, 45 N. Y. 822; Bigelow *v.* Benedict, 70 N. Y. 202; Brua's Appeal, 55 Pa. St. 294; Brown *v.* Speyer, 20 Gratt.

309; Philips *v.* Ocmulgee Mills, 55 Ga. 633; Noyes *v.* Jenkins, 55 Ga. 586; Fonville *v.* Casey, 1 Murphy, 389; Whitehead *v.* Root, 2 Metc. (Ky.) 584; McCarty *v.* Blevins, 13 Tenn. 195; Wilson *v.* Wilson, 37 Mo. 1; Logan *v.* Musick, 81 Ill. 415; Pixley *v.* Boynton, 79 Ill. 351; Pickering *v.* Cease, 79 Ill. 328; Lyon *v.* Culbertson, 83 Ill. 33; Corbett *v.* Underwood, 83 Ill. 324; Sanborn *v.* Benedict, 78 Ill. 309; Wolcott *v.* Heath, 78 Ill. 433; Crawford *v.* Spencer, 92 Mo. 498; White *v.* Barber, 123 U. S. 392; Gruner *v.* Stucker, 39 La. Ann. 1076; Wolffe *v.* Perryman (Ala.), 9 So. 148; Mohr *v.* Miesen, 47 Minn. 228; Miles *v.* Andrews, 40 Ill. App. 155; Pope *v.* Hanke, 155 Ill. 617; Warren *v.* Scanlan, 59 Ill. App. 138.

[1]Ashton *v.* Dakin, 4 H. & N. 867; Sawyer, Wallace & Co. *v.* Taggart, 14 Bush, 730; Cameron *v.* Durkheim, 55 N. Y. 425. But see *contra,* Brua's Appeal, 55 Pa. St. 294; Fareira *v.* Gabell, 89 Pa. St. 89; North *v.* Phillips, 89 Pa. St. 250; Douglass et al. *v.* Smith, 74 Iowa, 468.

[2]Sawyer et al. *v.* Taggart, 14 Bush, 730.

[3]Story *v.* Salomon, 71 N. Y. 420; Kingsbury *v.* Kirwan, 71 N. Y. 612; Harris *v.* Lumbridge, 83 N. Y. 92; Bigelow *v.* Benedict, 70 N. Y. 202.

[1]Bigelow *v.* Benedict, 70 N. Y. 202. In this case A., for a valuable consideration, agreed to purchase gold coin of B. at a named price, the coin to be delivered at any time within six months, that B. might choose. This case, as a legitimate transaction, is more easily understood than where the option is to buy certain goods or to sell others, but the latter can exist under lawful circumstances and have a lawful end in view. See Story *v.* Salomon, 71 N. Y. 420. But see, *contra,* under State statute, Osgood *v.* Bander, 75 Iowa, 550; Schneider *v.* Turner, 130 Ill. 28; Sheehy *v.* Shinn, 103 Cal. 325; Riordan *v.* Doty, 50 S. C. 537; Sampson *v.* Camperdown, 82 Fed. 833.

[2]Story *v.* Salomon, 71 N. Y. 420; Harris *v.* Lumbridge, 83 N. Y. 92, and the cases cited in the next note.

[3]Rumsey *v.* Berry, 65 Me. 574; Wyman *v.* Fiske, 3 Allen, 238; Brigham *v.* Meade, 10 Allen, 246; Barratt *v.* Hyde, 7 Gray, 160; Brown *v.* Phelps, 103 Mass. 303; Hatch *v.* Douglass, 48 Conn. 116; Noyes *v.* Spaulding, 27 Vt. 240; Story *v.* Salomon, 71 N. Y. 420; Bigelow, *v.* Benedict, 70 N. Y. 202; Harris *v.* Lumbridge, 83 N. Y. 92; North *v.* Phillips, 83 Pa. St. 250; Ruchizky *v.* De Haven, 97 Pa. St. 202; Dickson's Ex'or *v.* Thomas, 97 Pa. St. 278; Kirkpatrick *v.* Bonsall, 72 Pa. St. 155; Brown *v.* Speyer, 20 Gratt. 296; Williams *v.* Carr, 80 N. C. 294; Williams *v.* Tiedemann, 6 Mo. App. 269; Lyon *v.* Culbertson, 83 Ill. 33; Cole *v.* Milmine, 88 Ill. 349; Corbitt *v.* Underwood, 83 Ill. 324; Pickering *v.* Cease, 79 Ill. 338; Pixley *v.* Taggert, 79 Ill. 351; Barnard *v.* Backhouse, 52 Wis. 593; Sawyer *v.* Taggert, 14 Bush, 727; Gregory *v.* Wendall, 39 Mich. 337; Shaw *v.* Clark, 49 Mich. 384; Gregory *v.* Wattoma, 58 Iowa, 711; Everingham *v.* Meighan, 55 Wis. 354; Rudolph *v.* Winters, 7 Neb. 125; Dance *v.* Phelan, 82 Ga. 243; Fortenbury *v.* State, 47 Ark. 188 (not unconstitutional because in restraint of trade); Harvey *v.* Menill, 150 Mass. 1; McGrew *v.* City Produce Exchange (Tenn.), 1 Pickle, 572; Mutual Life Ins. Co. *v.* Watson, 30 Fed. 653; Sprague *v.* Warren, 26 Neb. 326; Davis *v.* Davis, 119 Ind. 511; Hahn *v.* Walton, 46 Ohio St. 195;

Schumechle *v.* Waters, 125 Ind. 265; Jamieson *v.* Wallace, 167 Ill. 388; Wheeler *v.* McDermed, 36 Ill. App. 179; Stewart *v.* Parnell, 147 Pa. St. 523; Kullman *v.* Simmens, 104 Cal. 595; Sheehy *v.* Shinn, 103 Cal. 325.

[1]Sampson *v.* Camperdown, 82 Fed. 833.

[1]Story *v.* Salomon, 71 N. Y. 420; Amsden *v.* Jacobs, 75 Hun, 311; Schreiner *v.* Orr, 55 Mo. App. 406; Warren *v* Scanlan, 59 Ill. App. 138; Watte *v.* Wickersham, 27 Neb. 457; Bangs *v.* Hornack, 30 Fed. 97; Powell *v.* McCord, 121 Ill. 330; McGrew *v.* City Produce Exchange (Tenn.), 1 Pickle, 572.

[2]"It is a general rule, that wheresoever the words of a deed, or of the parties without deed, may have a double intendment, and the one standeth with law and right, and the other is wrongful and against law, the intendment that standeth with the law shall be taken." Coke on Lyttleton, 42, 183.

[3]Story *v.* Salomon, 71 N. Y. 420; Kingsbury *v.* Kirwan, 71 N. Y. 612; Harris *v.* Lumbridge, 83 N. Y. 92; Williams *v.* Tiedemann, 6 Mo. App. 274; Ward *v.* Vosburgh, 31 Fed. 12; Crawford *v.* Spencer, 92 Mo. 498; Benson *v.* Morgan, 26 Ill. App. 22; Sampson *v.* Camperdown, 82 Fed. 833; Pratt *v.* Boody, 55 N. J. Eq. 175; Union Nat. Bank of Chicago *v.* Carr, 15 Fed. Rep. 438; and cases cited in preceding note.

[4]Rumsey *v.* Berry, 65 Me. 570; Williams *v.* Carr, 80 N. C. 94; Sawyer et al. *v.* Taggert, 14 Bush, 727; Gregory *v.* Wendall, 39 Mich. 337.

[5]Story *v.* Salomon, *supra.*

[1]Barnard *v.* Backhous, 52 Wis. 593. See, to the same effect, Cobb *v.* Prell, 15 Feb. Rep. 774.

[2]Riordan *v.* Doty, 50 S. C. 537.

[1]See, also, Benjamin on Sales, and Greenhood on Public Policy.

[1]Boston *v.* Schaffer, 9 Pick. 415; Com. *v.* Stodder, 2 Cush. 562; Mayor of New York *v.* 2nd Ave. R. R. Co., 32 N. Y. 261; Brooklyn *v.* Breslin, 57 N. Y. 591; State *v.* Hoboken, 33 N. J. L. 280; Muhlenbrinck *v.* Com., 42 N. J. L. 364 (36 Am. Rep. 518); Johnson *v.* Philadelphia, 60 Pa. St. 445; Bennett *v.* Borough of Birmingham, 31 Pa. St. 15; State *v.* Roberts, 11 Gill & J. 506; The Germania *v.* State, 7 Md. 1; Slaughter *v.* Com., 13 Gratt. 767; Wynne *v.* Wright, 1 Dev. & B. (N. C.) L. 19; Home Ins. Co. *v.* Augusta, 50 Ga. 530; Savannah *v.* Charlton, 36 Ga. 460; Mayor *v.* Phelps, 27 Ala. 55; Mays *v.* Cincinnati, 1 Ohio St. 268; Cincinnati *v.* Bryson, 15 Ohio, 625; Chilvers *v.* People, 11 Mich. 43; State *v.* Herod, 29 Iowa, 123; People *v.* Thurber, 13 Ill. 557; Cairo *v.* Bross, 101 Ill. 475; Kniper *v.* Louisville, 7 Bush, 599.

[2]Rankin *v.* City of Henderson (Ky.), 7 S. W. 174; State *v.* Wright, 14 Oreg. 365.

[3]Dunham *v.* Rochester, 5 Cow. 462; Muhlenbrinck *v.* Commissioners, 42 N. J. L. 364; Com. *v.* Brinton, 132 Pa. St. 69; State *v.* Harrington, 68 Vt. 622; Frommer *v.*

Richmond, 31 Gratt. 646; State *v.* Richards, 32 W. Va. 348; Huntington *v.* Cheesbro, 57 Ind. 74; Mays *v.* Cincinnati, 1 Ohio St. 268; Barling *v.* West, 29 Wis. 307; St. Paul *v.* Traegar, 25 Minn. 248; Temple *v.* Sumner, 51 Miss. 13; Ex parte, Ah Toy, 57 Cal. 92. In State *v.* Harrington, the Vermont statute required a deposit of $500 with the State treasurer, and the payment of $25, as a condition precedent to the procurement of a State license. The deposit of $500 was required as a guaranty fund against fraud and violations of of the law, and it was returned to the itinerant vendor at the end of the year, less whatever fines and penalties may have been imposed upon him for infractions of the law. The Vermont statute evidently considered the regulations to be an exercise of the police power, and not of the power of taxation. In Commonwealth *v.* Gardner, 133 Pa. St. 284, the licensing of peddlers was expressly declared to be an exercise of police power. The same ruling was expressly made in State ex rel. Luria *v.* Wagener, 69 Minn. 206, and the act was held to be unconstitutional because it discriminated against certain classes or kinds of hawkers and peddlers. See, also, generally, as to the regulation of hawkers and peddlers, Kennedy *v.* People, 9 Colo. App. 490; Hall *v.* State, 39 Fla. 637; City of Carlisle *v.* Hechinger (Ky. '98), 45 S. W. 358; People *v.* Baker, 115 Mich. 199; Grand Rapids *v.* Norman, 110 Mich. 544; Kirkpatrick *v.* Davis Clock Co., 49 La. Ann. 871; State *v.* Rhyne, 119 N. C. 905.

[1]People *v.* Mulholland, 19 Hun, 548; *s. c.* 82 N. Y. 324; Chicago *v.* Bartree, 100 Ill. 57.

[2]Gundling *v.* City of Chicago, 176 Ill. 340.

[3]Simmons *v.* State, 12 Mo. 268; St. Louis *v.* Sternberg, 69 Mo. 289; State *v.* Hibbard, 3 Ohio, 33; Savannah *v.* Charlton, 36 Ga. 460; Wilder *v.* Mayor of Savannah, 70 Ga. 760; Young *v.* Thomas, 17 Fla. 169; Longville *v.* State, 4 Tex. App. 312; Bullitt *v.* City of Paducah (Ky.), 3 S. W. 802.

[4]Mayor &c. of Mobile *v.* Yuille, 3 Ala. 137.

[5]City of Oil City *v.* Oil City Trust Co., 151 Pa. St. 454; State *v.* City of Columbia, 6 Rich. L. 404; New Orleans *v.* N. O. Sav. Inst., 32 La. Ann. 527.

[6]Brooklyn *v.* Breslin, 57 N. Y. 591; Frankfort &c. R. R. Co. *v.* Philadelphia, 58 Pa. St. 562: Commonwealth *v.* Matthews, 122 Mass. 60; City Council *v.* Pepper, 1 Rich. L. 364; Cincinnati *v.* Bryson, 15 Ohio, 625; Little *v.* State, 8 Ohio C. C. 51; St. Louis *v.* Green, 70 Mo. 562; Logan *v.* Pyne, 43 Iowa, 524; St. Paul *v.* Smith, 27 Minn. 164; Snyder *v.* North Lawrence, 8 Kans. 82; Bowser *v.* Thompson (Ky. '98), 45 S. W. 73. Generally, it is held that the license tax cannot be imposed upon private vehicles, at least, as a police regulation. St. Charles *v.* Nolle, 51 Mo. 122; St. Louis *v.* Grone, 46 Mo. 574; Collingsville *v.* Cole, 78 Ill. 114. But private as well as public vehicles may, of course, be taxed. Biddle *v.* Philadelphia Ry. Co., 1 Pittsb. Leg. J. 79; Knoxville *v.* Sanford, 13 Lea, 545; Edenton *v.* Capeheart, 71 N. C. 156; Frommer *v.* Richmond, 31 Va. 646; Bates *v.* Mobile, 46 Ala. 158.

[1]New York *v.* Eden Musée American Co., 102 N. Y. 593; Com. *v.* Gee, 6 Cush. 174; Germania *v.* State, 7 Md. 1; State *v.* Miller, 93 N. C. 511; State *v.* Schonhausen,

37 La. Ann. 42; Charity Hospital *v.* Stickney, 2 La. Ann. 550; Mabry *v.* Tarner, 1 Humph. 94.

[2]Marmet *v.* State, 45 Ohio St. 63; City of Grand Rapids *v.* Braudy, 105 Mich. 670.

[3]Commonwealth *v.* Roswell (Mass. '99), 53 N. E. 132.

[4]Wiggins *v.* Chicago, 68 Ill. 372; Decorah *v.* Dunstan, 38 Iowa, 96; Fretwell *v.* Troy, 18 Kans. 271.

[5]Licensing of liquor trade. State *v.* Cassidy, 22 Minn. 312 (21 Am. Rep. 767); Bancroft *v.* Dumas, 21 Vt. 456; State *v.* Brown, 19 Fla. 563; Lewellen *v.* Lockhardts, 21 Gratt. 570; Hirsh *v.* State, 21 Gratt. 785; Wiley *v.* Owens, 39 Ind. 429; Pleuler *v.* State, 11 Neb. 547; State *v.* Harris, 10 Iowa, 441; Hammond *v.* Haines, 25 Md. 541; Trustees *v.* Keeting, 4 Denio, 341; Town Council *v.* Harbers, 6 Rich. L. 96; State *v.* Plunkett, 3 Harr. (N. J.) 5; Burckholter *v.* McConnellsville, 20 Ohio St. 308; State *v.* Sherman, 20 Mo. 265; State ex rel. Troll *v.* Hudson, 78 Mo. 302; Gunnarssohn *v.* Sterling, 92 Ill. 669; East St. Louis *v.* Wehrung, 46 Ill. 392; Hill *v.* Decatur, 22 Ga. 203; Youngblood *v.* Sexton, 32 Mich. 406 (20 Am. Rep. 654).

[1]In re Garza, 28 Tex. App. 381 (houses of ill-fame; power to license must be expressly conferred).

[2]Voight *v.* Board of Excise Comrs., 59 N. J. L. 358; Ex parte Williams, 31 Tex. Cr. Rep. 262; City of St. Charles *v.* Hackman, 133 Mo. 634; State ex rel. Dickason *v.* Marion Co. Court, 128 Mo. 427.

[3]Commonwealth *v.* Crane, 158 Mass. 218.

[1]Boston *v.* Schaffer, 9 Pick. 415; Welch *v.* Hotchkiss, 39 Conn. 140; Johnson *v.* Philadelphia, 60 Pa. St. 445; State *v.* Hoboken, 41 N. J. L. 71; Ash *v.* People, 11 Mich. 347; Van Baalen *v.* People, 40 Mich. 458; Burlington *v.* Putnam Ins. Co., 31 Iowa, 102. Thus a license tax of $300 was imposed upon packers and canners of oysters, and it was held to be reasonable. State *v.* Applegarth, 81 Md. 293. So, also, a State license tax of $300, imposed upon hawkers and peddlers, was sustained in Florida. Hall *v.* State, 39 Fla. 637. And a city license tax of $15 on the same class was sustained as reasonable in Michigan. Grand Rapids *v.* Norman, 110 Mich. 544.

[1]See Brimmer *v.* Rebman, 138 U. S. 78; Harmon *v.* City of Chicago, 147 U. S. 396; In re Lebolt, 77 Fed. 587; Booth *v.* Lloyd, 33 Fed. 593; Willis *v.* Standard Oil Co., 50 Minn. 290; Webster *v.* Bell, 68 Fed. 183; 15 C. C. A. 360; City of San Bernardino *v.* Southern Pacific Co., 107 Cal. 524. But see Henderson Bridge Co. *v.* Com. (Ky.), 31 S. W. 486.

[1]State *v.* Cassidy, 22 Minn. 312 (21 Am. Rep. 765).

[2]Youngblood *v.* Sexton, 32 Mich. 406 (20 Am. Rep. 554); Carter *v.* Dow, 16 Wis. 299; Tenny *v.* Lanz, 16 Wis. 566. "In granting licenses, the items which may be taken into consideration as elements fixing the costs of the same, would seem to be about as

follows: *First,* the value of the labor and material in merely allowing and issuing the license; *second,* the value of the benefit of the license to the person obtaining the same; *third,* the value of the convenience and cost to the public in protecting such business and in permitting it to be carried on in the community; *fourth,* and in some cases an additional amount imposed as a restraint upon the number of persons who might otherwise engage in the business. None of these items contemplates, except incidentally, the raising of revenue for general purposes. In many cases, the license, which, if issued for the proper purposes would be valid, would not be valid if issued merely for the purpose of obtaining or increasing the general revenue fund." Leavenworth *v.* Booth, 15 Kan. 627. "It is no doubt true that the city was empowered to resort to other means of restraint (than requiring heavy licenses of saloon keepers) such as requiring such houses to be orderly, and in other respects to conform to such ordinances as might be adopted to properly restrain the business; but the fact that they had other powers conferred for this purpose in nowise prevented the city from exercising the power to restrain the general free sale of liquors by requiring that a license should be obtained before it could be sold." Mt. Carmel *v.* Wabash, 50 Ill. 69; Emporia *v.* Volmer, 12 Kan. 622; Adler *v.* Whitbeck, 44 Ohio St. 539; Portwood *v.* Baskett, 64 Miss. 213.

[1]See McBride *v.* State Revenue Agent, 70 Miss. 716; Marmet *v.* State, 45 Ohio St. 63, where the tax was graded according to the volume of the business.

[2]But see *contra* City of Oil City *v.* Oil City Trust Co., 151 Pa. St. 454.

[3]See *post,* § 125.

[1]In re Hoover, 30 Fed. 51.

[2]§ 86.

[3]Ex parte Felchin, 96 Cal. 360.

[1]Foster *v.* Board of Police Com'rs of San Francisco, 102 Cal. 483.

[2]State *v.* Wagener, 69 Minn. 206. But see *contra* Sydow *v.* Territory (Ariz.), 36 P. 214, as to the validity of a similar law. In the cases of Weaver *v.* State, 89 Ga. 639; Singer Mfg. Co. *v.* Wright, 97 Ga. 115, the Supreme Court of Georgia sustained the constitutionality of license laws which imposed a license tax upon vendors of sewing machines who were likewise manufacturers, and exempted from the required license all other sewing machine vendors. Notwithstanding that the weight of authority seems to be the other way, I am satisfied that the Minnesota case is sound law.

[3]State *v.* Moore, 113 N. C. 697.

[1]Ex parte Whitwell, 98 Cal. 273.

[2]See *ante,* § 45.

[3]See § 58.

[1]State *v.* French, 17 Mont. 54 (41 P. 1078).

[2]In re Yot Sang, 75 Fed. 983.

[3]Yick Wo *v.* Hopkins, 118 U. S. 356. Statutes have been sustained, which imposed a prohibitive license tax of $1,000 upon all who are engaged in "gift enterprises," i. e., who offer prizes, gifts and premiums, as an inducement to buy their goods. Humes *v.* City of Fort Smith, Ark., 93 Fed. 857; Lansburgh *v.* District of Columbia, 11 App. D. C. 512. This prohibitive legislation is based upon the principle that the gift enterprises are inherently fraudulent. If this be true, which I doubt, there can be no question of the soundness of the position of the courts, in sustaining these statutes.

[1]Commonwealth *v.* Brinton, 132 Pa. St. 62; Commonwealth *v.* Gardner, 133 Pa. St. 284.

[1]Chilvers *v.* People, 11 Mich. 43.

[2]Chilvers *v.* People, 11 Mich. 49.

[3]Leavenworth *v.* Booth, 15 Kan. 627.

[1]St. Paul *v.* Traeger, 25 Minn. 248. See, also, Mayor *v.* 2nd Ave. R. R. Co., 32 N. Y. 261; Kip *v.* Paterson, 26 N. J. 298; State *v.* Hoboken, 41 N. J. 71; Commonwealth *v.* Stodder, 2 Cush. 562; Johnson *v.* Philadelphia, 60 Pa. St. 445; Muhlenbrinck *v.* Commissioners, 42 N. J. 364 (36 Am. Rep. 518); State *v.* Roberts, 11 Gill & J. 506; Home Ins. Co. *v.* Augusta, 50 Ga. 530; Burlington *v.* Bumgardner, 42 Iowa, 673; Cairo *v.* Bross, 101 Ill. 475; Mayor *v.* Cincinnati, 1 Ohio St. 268.

[1]People *v.* Thurber, 13 Ill. 554; Commonwealth *v.* Germania, L. I. Co., 11 Phila. 553; Walker *v.* Springfield, 94 Ill. 364; State *v.* Lathrop, 10 La. Ann. 398; Ex parte Conn, 13 Nev. 424; Trustees E. F. Fund *v.* Roome, 93 N. Y. 313; N. Y. Board of Fire Underwriters *v.* Whipple, 37 N. Y. S. 712; 2 App. Div. 361; Leavenworth *v.* Booth, 15 Kan. 627. So, also, as to tax on agents of foreign express companies, Crutcher *v.* Com., 89 Ky. 6; Woodward *v.* Com. (Ky.), 7 S. W. 613.

[2]Robertson *v.* Commonwealth (Ky), 40 S. W. 920.

[3]Cooley Const. Lim. 613; Ould *v.* Richmond, 23 Gratt. 464 (14 Am. Rep. 139); Commonwealth *v.* Moore, 25 Gratt. 951; Gatlin *v.* Tarborso, 78 N. C. 419; State *v.* Hayne, 4 Rich. L. 403; Young *v.* Thomas, 17 Fla. 169 (35 Am. Rep. 328); Stewart *v.* Potts, 49 Miss. 949; State *v.* Endom, 23 La. Ann. 663; New Orleans *v.* Kaufman, 29 La. 283 (29 Am. Rep. 328); Albrecht *v.* State, 8 Tex. Ct. App. 216 (34 Am. Rep. 737); Cousins *v.* State, 59 Ala. 113 (20 Am. Rep. 290); Sweet *v.* Wabash, 41 Ind. 7; Youngblood *v.* Sexton, 32 Mich. 406 (20 Am. Rep. 654); Morrill *v.* State, 38 Wis. 428 (20 Am. Rep. 12); Ex parte Frank, 52 Cal. 606 (28 Am. Rep. 642); Ex parte Robinson, 12 Nev. 263. In Cincinnati *v.* Bryson, 15 Ohio, 625, Judge Read, in a dissenting opinion, denies that the legislature of Ohio has the power to tax occupations.

[1]Webbe *v.* Commonwealth, 33 Gratt. 898.

[2]St. Louis *v.* Green, 6 Mo. App. 590; Lewellen *v.* Lockharts, 21 Gratt. 570; Hirsh *v.* State, 21 Gratt. 785.

[3]Municipality *v.* Dubois, 10 La. Ann. 56. See, also, to the same effect, Youngblood *v.* Sexton, 32 Mich. 406 (20 Am. Rep. 654); Gatlin *v.* Tarboro, 78 N. C. 119; Mayor, etc., *v.* Beasley, 1 Humph. 232; Ex parte Robinson, 12 Nev. 263; State *v.* Endon, 23 La. Ann. 663; People *v.* Thurber, 13 Ill. 554; State *v.* Applegarth, 81 Md. 293; Weaver *v.* State, 89 Ga. 639; Singer Mfg. Co. *v.* Wright, 97 Ga. 115; State *v.* Richards, 32 W. Va. 348; Marmet *v.* State, 45 Ohio. St. 63 (rate of license graded according to volume of business); Hall *v.* State, 39 Fla. 637; State *v.* Moore, 113 N. C. 697.

[1]Goshen *v.* Kern, 63 Ind. 468. In this case the occupation was that of auctioneers. In the case of peddling, Huntington *v.* Cheesbro, 57 Ind. 74; Temple *v.* Sumner, 51 Miss. 13; Ex parte Ah Foy, 57 Cal. 92. Peddlers are sometimes punished criminally for plying their trade without a license. Hall *v.* State, 39 Fla. 637; Commonwealth *v.* Heckinger (Ky. ’98), 42 S. W. 101. The same prohibition and the imposition of a fine for doing business without a license, has been applied to the business of pawnbrokers, and dealers in second-hand articles. Marmet *v.* State, 45 Ohio St. 63. These are all cases of undoubted police regulations. And, probably, as a means of preventing adulteration in milk, the application of the same rule to vendors of milk would be equally justifiable, and such vendors be prohibited from selling milk until they had procured their licenses. See to that effect, People *v.* Mulholland, 19 Hun, 548; *s. c.* 82 N. Y. 324; Chicago *v.* Bartree, 100 Ill. 57.

[1]Chauvin *v.* Valiton, 8 Mont. 451.

[2]Const. Lim. 645.

[1]See Henderson’s Distilled Spirits, 14 Wall. 44.

[2]“What is a license? It is defined to be a right given by some competent authority to do an act which, without such authority, would be illegal. The position of a city then is that, notwithstanding Dr. Charlton has a license from the State to practice medicine anywhere in the State, yet if he exercise the privilege thereby granted in the city of Savannah without a license from the city, it will be illegal. In other words if he acts under a license from the State, he becomes a criminal. The effect of which is to elevate the ordinance of a city above the laws of the State. * * * Under the name of license Dr. Charlton cannot be prohibited from availing himself, in the city, of a privilege conferred on him by the State. He is not here contesting the authority of the city to tax him for practicing his profession; what he contends for is, that the city shall not make that illegal which by the law of the State is legal. We see no good reason why the city may not tax the practice of any profession within the corporate limits.” Savannah *v.* Charlton, 36 Ga. 460.

[3]Chilvers *v.* People, 11 Mich. 43.

[1]Cooley, J., in Youngblood *v.* Sexton, 32 Mich. 406.

[2]But the owner must receive notice of the levy and sale, in order to make the proceeding constitutional. Chauvin *v.* Valiton, 8 Mont. 451.

[1]Metropolitan Board *v.* Barrie, 34 N. Y. 657. "Nor can it be doubted that the legislature has the power to prohibit the sale of spirituous or fermented liquors in any part of the State, notwithstanding a party to be affected by the law may have procured a license, under the general license laws of the State, which has not yet expired. Such a license is in no sense a contract made by the State with the party holding the license. It is a mere permit, subject to be modified or annulled at the pleasure of the legislature, who have the power to change or repeal the law under which the license was granted." Fell *v.* State, 42 Md. 71 (20 Am. Rep. 83); Commonwealth *v.* Kingsley, 133 Mass. 578; La Croix *v.* Fairfield Co. Comrs., 49 Conn. 591; Reed *v.* Beall, 42 Miss. 572; Coulson *v.* Harris, 43 Miss. 728; Robertson *v.* State, 12 Tex. App. 541; Schwuchon *v.* Chicago, 68 Ill. 444; Prohibition Amendment Cases, 24 Kan. 700; Voight *v.* Board of Excise Commissioners, 59 N. J. 58; City of St. Charles *v.* Hackman, 133 Mo. 634; State ex rel. Dickason *v.* Marion Co. Court, 128 Mo. 427. And it is, likewise, true that a license from the Internal Revenue Department of the United States government to carry on the business, such as that of selling oleomargarine, does not give one a right to carry on such business in violation of the prohibitory law of the State. Commonwealth *v.* Crane, 158 Mass. 218.

[1]Plumb *v.* Christie, 103 Ga. 686; Deal *v.* Singletary, 105 Ga. 466.

[2]Reichmuller *v.* People, 44 Mich. 280.

[3]State *v.* Washington, 44 N. J. L. 605 (43 Am. Rep. 402).

[4]State ex rel. Dickason *v.* Marion Co. Court, 128 Mo. 427; Ex parte Williams, 31 Tex. Cr. Rep. 262; Trezvant *v.* State (Tex. Cr. Rep.), 20 S. W. 582.

[5]See *post,* § 164, for a discussion of the prohibition of the sale of personal property.

[1]Butcher's Union Co. *v.* Crescent City Co., 111 U. S. 746, 762.

[1]Yick Wo *v.* Hopkins, 118 U. S. 356, 370.

[2]98 N. Y. 98, 106, 107.

[1]99 N. Y. 377.

[2]See *ante,* § 60.

[1]State *v.* Williams, 11 S. C. 288; Childers *v.* Mayor, 3 Sneed, 356; Stone *v.* State, 22 Tex. App. 185; State *v.* Schaffer, 74 Iowa, 704; Heizinger *v.* State, 70 Md. 278; People *v.* Hanrahan, 75 Mich. 611; Com. *v.* Shea, 150 Mass. 314; Freman *v.* State, 119 Ind. 501; People *v.* Slater, 119 Cal. 620 (one woman is sufficient to make it a house of ill-fame). Keeping a disorderly house is generally held to be unlawful. In State *v.* Haberle, 72 Iowa, 138, it was held not unconstitutional for a statute to allow conviction on the proof of general reputation of the place. In Thatcher *v.* State, 48

Ark. 60, it was held that noise and boisterous conduct are not essential to the offense. Beard *v.* State, 71 Md. 275 (do.). In Huffman *v.* State, 23 Tex. App. 491; Sara *v.* State, 22 Tex. App. 639, it was held that general reputation is sufficient as to the character of house; but the defendant must be proved to be keeper by direct evidence.

[2]See *ante,* § 116.

[3]Freleigh *v.* State, 8 Mo. 606; State *v.* Sterling, *Ib.* 797; Terry *v.* Olcott, 4 Conn. 442; Ex parte Blanchard, 9 Nev. 101; Kohn *v.* Koehler, 21 Hun, 466; Hart *v.* People, 26 Hun, 396. See State *v.* Phalen, 3 Harr. 441, in which it is held that an act, prohibiting lotteries, cannot act retrospectively, so as to affect a lottery which is carried on under special grant of the legislature. In Nevada, a law was sustained, as not being local legislation, which prohibited gambling in only one county, the act prohibiting gambling in any county, in which more than 1,500 votes had been cast at the preceding general election. State ex rel. Patterson *v.* Donovan, 20 Nev. 75; 15 P. 783. See, generally, Downey *v.* State, 115 Ala. 108; Bibb. *v.* State, 84 Ala. 13; Copeland *v.* State, 36 Tex. Cr. Rep. 576; 38 S. W. 189; Haring *v.* State, 51 N. J. L. 386; People *v.* Fallon, 152 N. Y. 12; People *v.* Van DeCarr, 150 N. Y. 439; Vowells *v.* Commonwealth, 84 Ky. 52; Newman *v.* People, 23 Colo. 300; Wooten *v.* State, 23 Fla. 335; Dunbar *v.* State, 34 Tex. Cr. R. 596; Emmons *v.* State, 34 Tex. Cr. R. 98, 118; Humphreys *v.* State, 34 Tex. Cr. R. 434; McBride *v.* State, 39 Fla. 442; State *v.* Gilmore, 98 Mo. 206; Commonwealth *v.* Blankinship, 165 Mass. 40 (in this case, it was a gambling club).

[1]§ 60.

[2]State *v.* Burgdoerfer, 107 Mo. 1; State *v.* Thomas, 138 Mo. 95; Irving *v.* Britton, 28 N. Y. S. 529.

[3]State *v.* Roby, 142 Ind. 168.

[4]Soby *v.* People, 134 Ill. 66; Caldwell *v.* People, 67 Ill. App. 367; Fortenbury *v.* State, 47 Ark. 188.

[1]Legislature has the power in an act forbidding the sale of impure or adulterated milk, to fix a standard by which it shall be judged. People *v.* Cipperly, 101 N. Y. 634; State *v.* Smythe, 14 R. I. 100 (51 Am. Rep. 344); Commonwealth *v.* Waite, 9 Allen, 264; Commonwealth *v.* Farren, 9 Allen, 489; Polenskie *v.* People, 73 N. Y. 65; Powell *v.* Com. (Pa.), 7 A. 913.

[1]State *v.* Ah Sam, 15 Nev. 27 (Am Rep. 454); State *v.* Ah Chew, 16 Nev. 50 (40 Am. Rep. 488). See State *v.* Lee, 137 Mo. 143. In re Ah Jow, 29 Fed. Rep. 181, it was held that it was unconstitutional to make it a misdemeanor for any one to frequent, resort to or visit any room where opium is sold or given away, unless the prohibition is confined to visits for criminal purposes.

[1]Johnson *v.* Simonton, 43 Cal. 542.

[2]Patterson *v.* Kentucky, 97 U. S. 501.

[3]People *v.* Girard, 73 Hun, 457; *s. c.* 145 N. Y. 105; Weller *v.* State, 53 Ohio St. 77. A more rational law is that which was sustained in Stolz *v.* Thompson, 44 Minn. 271, as a legitimate exercise of the police power, whereby the sale of baking powders, containing alum, was prohibited, unless a label was affixed to the box or package, announcing that "this baking-powder contains alum." The fact, however, that alum in baking-powders makes the compound unwholesome, would undoubtedly have justified a total prohibition of its use in the manufacture of baking powder.

[1]People *v.* Girard, 145 N. Y. 105.

[2]Weller *v.* State, 53 Ohio St. 77.

[1]See *ante,* § 89.

[2]"The central idea of the statute before us seems very manifest; it was, in our opinion, the prevention of facilities for selling or manufacturing a spurious article of butter, resembling the genuine article so closely in its external appearance, as to render it easy to deceive purchasers into buying that which they would not buy but for the deception. The history of legislation on this subject, as well as the phraseology of the act itself, very strongly tend to confirm this view. If this was the purpose of the enactment now under discussion, we discover nothing in its provisions which enables us, in the light of the authorities, to say that the legislature, when passing the act, exceeded the power confided to that department of the government; and, unless we can say this, we cannot hold the act as being anything less than valid." State *v.* Addington, 77 Mo. 118.

[1]People *v.* Marx, 99 N. Y. 307 (52 Am. Rep. 314).

[2]In re John Brosnahan, Jr., 4 McCrary, 1.

[3]Palmer *v.* State, 39 Ohio St. 236. See *ante,* § 89.

[1]See *ante,* 89.

[2]Powell *v.* Commonwealth, 114 Pa. St. 265. See, also, in support of the law, Commonwealth *v.* Schollenberger, 156 Pa. St. 201.

[1]Powell *v.* Pennsylvania, 127 U. S. 678.

[1]Walker *v.* Commonwealth, 127 Pa. St. 692; State *v.* Newell, 140 Mo. 282; 41 S. W. 751; Butler *v.* Chambers, 36 Minn. 69. But see Ex parte Scott, 66 Fed. 45, which held such a law to be void, because, not being required as a protection to health, it was an unlawful interference with interstate commerce. This case, of course, has been overruled by the United States Supreme Court in the cases cited above, except as to sale of original packages which are manufactured in another State and shipped to a prohibitory State. See Commonwealth *v.* Schollenberger, 156 Pa. St. 201.

[1]Johnson *v.* Simonton, 43 Cal. 242.

[1]Fry *v.* State of Indiana, 63 Ind. 552 (18 Am. Law Reg. (n. s.) 425; Commonwealth *v.* Wilson, 14 Phila. (Pa.) 384.

[1]Burdick *v.* People, 149 Ill. 600, 611; State *v.* Corbett, 57 Minn. 345; Janrien *v.* State (Tex. Cr. App. 99), 51 S. W. 1126.

[1]People *v.* Warden of City Prison, 26 App. Div. 228; 50 N. Y. S. 56.

[2]People ex rel. Tyroler *v.* Warden of City Prison, 157 N. Y. 116.

[1]Wynehamer *v.* People, 13 N. Y. 378, 487; Metropolitan Board *v.* Barrie, 34 N. Y. 657.

[2]People *v.* Budd, 117 N. Y. 1; People ex rel. *v.* B. & A. R. R. Co., 70 N. Y. 569; Munn *v.* Illinois, 94 U. S. 113.

[1]Hibbard *v.* N. Y. & E. R. R. Co., 15 N. Y. 455, 466; Quimby *v.* Vanderbilt, 17 N. Y. 306; Rawson *v.* Pa. R. R. Co., 48 N. Y. 212.

[1]People *v.* Sheldon, 139 N. Y. 263; Judd *v.* Harrington, *id.* 105.

[1]As to which see *post,* §§ 127, 128.

[2]§ 151.

[1]Roth *v.* State, 51 Ohio St. 209.

[2]State *v.* Geer, 61 Conn. 144 (quail or grouse); Organ *v.* State, 56 Ark. 267 (fish); State *v.* Harrub, 95 Ala. 176 (oysters); State *v.* Melvin, 95 Ala. 176.

[3]State *v.* Chapel, 64 Minn. 384.

[4]Ex parte Maier, 103 Cal. 476.

[1]Roth *v.* Eppy, 80 Ill. 283; Wilkerson *v.* Rust, 57 Ind. 172; Fountain *v.* Draper, 49 Ill. 441; Church *v.* Higham, 44 Iowa, 482; Goodenough *v.* McGrew, 44 Iowa, 670; Gaussby *v.* Perkins, 30 Mich. 492; Badore *v.* Newton, 54 N. H. 117; Baker *v.* Pope, 2 Hun, 556; Quain *v.* Russell, 12 Hun, 376; Bertholf *v.* O'Reilly, 74 N. Y. 515; Baker *v.* Beckwith, 29 Ohio St. 314; State *v.* Ludington, 33 Wis. 107; Whitman *v.* Devere, 33 Wis. 70.

[1]Metropolitan Board Excise *v.* Barrie, 34 N. Y. 657; Wynehamer *v.* People, 3 Kern, 435; Warren *v.* Mayor, etc., Charleston, 2 Gray, 98; Fisher *v.* McGirr, 1 Gray, 26; Jones *v.* People, 14 Ill. 196; Goddard *v.* Jacksonville, 15 Ill. 588; People *v.* Hawley, 3 Gibbs, 330; Preston *v.* Drew, 33 Me. 559; State *v.* Noyes, 30 N. H. 279; State *v.* Snow, 3 R. I. 68; State *v.* Peckham, *Ib.* 293; State *v.* Paul, 5 R. I. 185; State *v.* Wheeler, 25 Conn. 290; Lincoln *v.* Smith, 27 Vt. 328; Sante *v.* State, 2 Clarke (Iowa), 165; Prohibitory Am. Cases, 25 Kan. 751 (37 Am. Rep. 284); Bartemeyer *v.* Iowa, 18 Wall. 729; State *v.* Mugler, 29 Kan. 252 (44 Am. Rep. 634); Perdue *v.* Ellis, 18 Ga.

586; Austin *v.* State, 10 Mo. 591; State *v.* Searcy, 20 Mo. 489; Our House *v.* State, 4 Greene (Iowa), 172; Zumhoff *v.* State, *Ib.* 526; State *v.* Donehey, 8 Iowa, 396; State *v.* Carney, 20 Iowa, 82; State *v.* Baughman, *Ib.* 497; State *v.* Gurney, 37 Me. 156; State *v.* Burgoyne, 7 Lea, 173 (40 Am. Rep. 60); State *v.* Prescott, 27 Vt. 194; Lincoln *v.* Smith, 27 Vt. 328; State *v.* Brennan's Liquors, 25 Conn. 278; State *v.* Common Pleas, 36 N. J. 72 (13 Am. Rep. 422); Tanner *v.* Village of Alliance, 29 Fed. Rep. 196, note; Koester *v.* State, 36 Kan. 27, prohibit sale by all but druggists for medical, scientific and mechanical purposes. Local option laws are constitutional. Ex parte Kennedy (Tex.), 3 S. W. 114. "The measures best calculated to prevent those evils and preserve a healthy tone of morals in the community, are subjects proper for the consideration of the legislature. Courts of justice have nothing to do with them, other than to discharge their legitimate duties in carrying into execution such laws as the legislature may establish, unless, indeed, they find that the legislature in making a particular law, has disregarded the restraints imposed upon it by the constitution of this State, or the United States." State *v.* Brennan, 25 Conn. 278. "There is, however, no occasion to pursue this topic. The law in question is, in our opinion, obnoxious to no objection, which could be derived from the establishment of the doctrine advanced by the defendant. It is not different in its character, although it may be more stringent in some of its provisions from those numerous laws, which have been passed in almost all civilized communities and in ours from the earliest settlement of our State, regulating the traffic in spirituous liquors, and which are based on the power possessed by every sovereign State, to provide by law, as it shall deem fit for the health, morals, peace and general welfare of the State, and which, whatever may have been thought of their expediency, have been invariably sustained as being within the competency of the legislature to enact." State *v.* Wheeler, *Ib.* "The weight of authority is overwhelming that no such immunity has heretofore existed, as would prevent State legislatures from regulating and even prohibiting the traffic in intoxicating drinks with a solitary exception. That exception is the case of a law operating so rigidly upon property in existence at the time of its passage, absolutely prohibiting its sale, as to amount to depriving the owner of his property." Justice Miller in Bartemeyer *v.* Iowa, 18 Wall. 129. "There certainly are provisions in all our State constitutions, which will not permit legislative bodies wantonly to interfere with or destroy many of the natural or constitutional rights of the citizens. Of this class are those provisions which secure the freedom of the press and of speech, and the freedom of debate. But we are not aware that there is any provision in our constitution which would prevent the legislature from prohibiting dram selling entirely." Napton, J., in Austin *v.* State, 10 Mo. 591.

[1]As stated already, the prohibition of the sale of intoxicating liquor has seldom been declared to be unconstitutional, but in the following opinion from the Supreme Court of Indiana, which has, however, been subsequently overruled, or at least departed from, a law which prohibited the manufacture of spirituous liquor was declared to be unconstitutional:—

"The court knows, as matter of general knowledge, and is capable of judicially asserting the fact, that the use of beer, etc., as a beverage, is not necessarily hurtful, any more than the use of lemonade or ice cream. It is the abuse, and not the use, of all these beverages that is hurtful. But the legislature enacted the law in question upon

the assumption that the manufacture and sale of beer, etc., were necessarily destructive to the community; and in acting upon that assumption, in our own judgment, it has invaded unwarrantably the right to private property and its use as a beverage and article of traffic.

"What harm, we ask, does the mere manufacture or sale or temperate use of beer do to any one? And the manufacturer or seller does not necessarily know what use is to be made by the purchaser of the article. It may be a proper one. And if an improper one, it is not the fault of the manufacturer or seller, but it is thus appropriated by the voluntary act of another person, and by his own wrong. And will the general principle be asserted that to prevent the abuse of useful things, the government shall assume the dispensation of them to all the citizens—put all under guardianship? Fire-arms and gunpowder are not manufactured and sold to shoot innocent persons with, but are often so misapplied. Axes are not made and sold to break heads with, but are often used for that purpose. * * * Yet who, for all this, has ever contended that the manufacture and sale of these articles should be prohibited as being nuisances, or be monopolized by government? We repeat, the manufacture and sale of liquors are not necessarily hurtful, and this court has the right to judicially inquire into and act upon the validity of the law in question." Beebe *v.* State, 6 Ind. 501.

[1]Dorman *v.* State, 34 Ala. 216; Boyd *v.* Bryant, 35 Ark. 69 (37 Am. Rep. 6); Trammell *v.* Bradley, 37 Ark. 356; Ex parte McClain, 61 Cal. 436 (44 Am. Rep. 554); Bronson *v.* Oberlin, 41 Ohio St. 476 (52 Am. Rep. 90). So, also, it has been held constitutional to prohibit sale of liquor within a certain distance of fair grounds. Heck *v.* State, 44 Ohio St. 536.

[1]Hudson *v.* Geary, 4 R. I. 485; Gabel *v.* Houston, 29 Tex. 335; State *v.* Ludwig, 21 Minn. 202.

[2]As to which see *ante,* § 68.

[3]State *v.* Christman, 67 Ind. 328.

[4]Grills *v.* Jonesboro, 8 Baxt. 247.

[5]State *v.* Welch, 36 Conn. 215; State *v.* Freeman, 38 N. H. 426; Smith *v.* Knoxville, 3 Head, 245; Maxwell *v.* Jonesboro, 11 Heisk. 257; Baldwin *v.* Chicago, 68 Ill. 418; Platteville *v.* Bell, 43 Wis. 488. In Ward *v.* Greenville, 1 Baxt. 228 (35 Am. Rep. 700), it was held to be unreasonable to compel saloons to be closed between 6 p. m. and 6 a. m. But a statute prohibiting sale of liquors between 11 p. m. and 5 a. m. was held to be constitutional. Hedderich *v.* State, 101 Ind. 564 (51 Am. Rep. 768.)

[1]State *v.* Strauss, 49Md. 288.

[2]Commonwealth *v.* Costello, 133 Mass. 192; Commonwealth *v.* Casey, 134 Mass. 194; Shultz *v.* Cambridge, 38 Ohio St. 659.

[3]See *post,* §§ 147, 148, in respect to the confinement of objectionable trades to certain localities.

[1]People *v.* Rosenberg, 67 Hun, 52.

[2]Cronin *v.* People, 82 N. Y. 318 (37 Am. Rep. 564); Metropolitan Board of Health *v.* Heister, 37 N. Y. 661; Milwaukee *v.* Gross, 21 Wis. 241; Villavaso *v.* Barthet, 39 La. Ann. 247; Beiling *v.* City of Evansville, 144 Ind. 644; City of Portland *v.* Meyer, 32 Oreg. 368 (52 P. 21).

[3]Commonwealth *v.* Stodder, 2 Cush. 561.

[4]In re Linahan, 72 Cal. 114.

[5]Shea *v.* Muncie, 145 Ind. 14. The requirement that the location of a saloon on a city block must depend upon the consent of a certain proportion of the owners of property on the block, is so common that it did not at first appear to be necessary to refer to it.

[6]Gundling *v.* City of Chicago, 176 Ill. 340.

[1]Baltimore *v.* Redecke, 49 Md. 217 (33 Am. Rep. 239).

[2]Ex parte Sing Lee, 96 Cal. 354; In re Hong Wah, 82 Fed. 623.

[3]City of St. Louis *v.* Dorr, 145 Mo. 466; 41 S. W. 1094.

[1]Matter of Jacobs, 98 N. Y. 98.

[2]Buffalo *v.* Webster, 10 Wend. 99; Bush *v.* Seabury, 8 Johns. 418; Winnsboro *v.* Smart, 11 Rich. L. 551; Bowling Green *v.* Carson, 10 Bush, 64; New Orleans *v.* Stafford, 27 La. Ann. 417 (21 Am. Rep. 563); Wartman *v.* Philadelphia, 33 Pa. St. 202; St. Louis *v.* Weber, 44 Mo. 547; Ash *v.* People, 11 Mich. 347; LeClaire *v.* Davenport, 13 Iowa, 210. But see *contra* Bethune *v.* Hayes, 28 Ga. 560; Caldwell *v.* Alton, 34 Ill. 416; Bloomington *v.* Wahl, 46 Ill. 489.

[3]27 La. Ann. 417 (21 Am. Rep. 563.)

[1]"The necessity of a public market, where the producers and consumers of fresh provisions can be brought together at stated times for the purchase and sale of those commodities is very apparent. There is nothing which more imperatively requires the constant supervision of some authority which can regulate and control it. Such authority in this country is seldom if ever vested in individuals. It can never be so well placed, as where it is put into the hands of the corporate officers who represent the people immediately interested. A municipal corporation, comprising a town of any considerable magnitude, without a public market subject to the regulation of its own local authorities, would be an anomaly which at present has no existence among us. The State might undoubtedly withhold from a town or city the right to regulate its markets, but to do so would be an act of tyranny, and a gross violation of the principle universally conceded to be just, that every community, whether large or small, should be permitted to control, in their own way, all those things which concern nobody but themselves. The daily supply of food to the people of a city is emphatically their own affair. It is true that the persons who bring provisions to the market have also a sort of

interest in it, but no such an interest as entitles them to a voice in its regulation. The laws of a market (I am now using the word in its larger sense) are always made by the persons who reside at the place, and that whether they be buyers or sellers. It is, therefore, the common law of Pennsylvania, that every municipal corporation which has power to make by-laws and establish ordinances to promote the general welfare and preserve the peace of a town or city, may fix the time or places of holding public markets for the sale of food, and make such other regulations concerning them as may conduce to the public interest. We take this to be the true rule, because it is necessary and proper, in harmony with the sentiments of the people, universally practiced by the towns, and universally submitted to by the residents of the country." Wartman *v.* Philadelphia, 33 Pa. St. 202.

[1]State ex rel. Daboval *v.* Police Jury of St. Bernard, 39 La. Ann. 759; State *v.* Natal (La.), 2 So. 305.

[1]111 U. S. 746, 756, 757.

[1]People *ex rel.* Tyroler *v.* Warden of City Prison, 157 N. Y. 116.

[2]§ 123.

[1]Cooley on Torts, pp. 277, 278.

[1]See *post,* § 141, on the Right of Eminent Domain.

[2]Patterson *v.* Wallmann, 5 N. D. 608; Nixon *v.* Reid, 8 S. D. 507. In the latter case, however, the exclusive franchise was sustained, on the ground that it had been granted before the adoption of the constitution, which prohibits the grant of special privileges, and that the grant had been acquiesced in by Congress.

[1]City of Laredo *v.* International Bridge and Tramway Co., 66 F. 246; 14 C. C. A. 1.

[2]Sands *v.* Manistee River Improvement Co., 123 U. S. 288; Ruggles *v.* Manistee River Improvement Co., 123 U. S. 297.

[3]Portland & Willamette Val. Ry. Co. *v.* City of Portland, 14 Oreg. 188.

[4]City of St. Paul *v.* Chicago, M. & St. P. Ry. Co., 63 Minn. 330. In New Orleans, similar grants of exclusive right to certain wharves, were made to a certain railroad, subject, however, to the right of the city to charge the customary wharfage dues to vessels, which occupied these wharves with the consent of the railroad company, but not in the promotion of the business of the railroad. When, afterwards, the city farmed out its revenues from certain wharves, including the railroad wharves, to the Louisiana Construction and Improvement Company, the right to collect these wharfage dues from such vessels passed to the assignee company. The Clearwater, 75 F. 309 (C. C. A.); New Orleans B., R. M. & C. A. S. S. Co. *v.* Louisiana Construction & Imp. Co., *Id.*

[1]State *v.* Post, 55 N. J. L. 264.

[2]11 Pet. 420.

[3]See the recent cases, Wheeling Bridge Co. *v.* Wheeling & Belmont Bridge Co., 34 W. Va. 155; Wheeling & Belmont Bridge Co. *v.* Wheeling Bridge Co., 138 U. S. 287.

[4]Vandine, Petitioner, 9 Pick. 187 (7 Am. Dec. 351); River Rendering Co. *v.* Behr, 7 Mo. App. 345; State *v.* Orr, 68 Conn. 101; City of Grand Rapids *v.* De Vries (Mich. 1900), 82 N. W. 269.

[1]In re Lowe, 54 Kans. 757. See, also, to the same effect, Kussel *v.* City of Erie, 8 Pa. Dist. Rep. 105.

[2]Norwich Gaslight Co. *v.* Norwich City Gas Co., 25 Conn. 19; State *v.* Cincinnati, etc., Gas Co., 18 Ohio St. 292; Parkersburg Gas Co. *v.* Parkersburg, 30 W. Va. 435.

[1]People's Gaslight Co. *v.* Jersey City, 40 N. J. L. 297; New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 650; Louisville Gas Co. *v.* Citizens' Gas Co., 115 U. S. 683; reversing *s. c.* 81 Ky. 263; Indianapolis *v.* Indianapolis Gas Co., 66 Ind. 396; Newport *v.* Newport Light Co., 84 Ky. 167; State *v.* Milwaukee Gaslight Co., 29 Wis. 454.

[2]Grand Rapids Electric, etc., Co. *v.* Grand Rapids Edison, etc., Co., 33 Fed. 659.

[3]Citizens' Street Railway Co. *v.* Jones, 34 Fed. 579; Davies *v.* New York, 14 N. Y. 506; In re N. Y. Elevated R. R. Co., 70 N. Y. 327; In re Gilbert Elevated R. R. Co., 70 N. Y. 361; Newell *v.* Minn., etc., Ry. Co., 35 Minn. 112; Des Moines Street Railway Co. *v.* Des Moines B. G. Street Railway Co., 73 Iowa, 513; Birmingham & P. M. Street Ry. Co. *v.* Birmingham Street Ry. Co., 79 Ala. 465; Fort Worth Street Ry. Co. *v.* Rosedale Street Ry. Co., 68 Tex. 169.

[4]Memphis *v.* Water Co., 5 Heisk. 492. But see *contra,* City of Brenham *v.* Brenham Water Co., 67 Tex. 143; Altgelt *v.* City of San Antonio, 81 Tex. 436; Edwards County *v.* Jennings (Tex.), 35 S. W. 1053; and in further support of the text, New Orleans Water Works Co. *v.* Rivers, 115 U. S. 674; St. Tammany Water Works Co. *v.* New Orleans Water Works Co., 120 U. S. 64; Stein *v.* Bienville Water Supply Co., 34 F. 145; Westerly Water Works *v.* Town of Westerly, 75 Fed. 181; Seamen's Friend Society *v.* City of Westerly, 75 Fed. 181; In re City of Brooklyn, 143 N. Y. 506; Long Island Water Supply Co. *v.* City of Brooklyn, 166 U. S. 685; Rockland Water Co. *v.* Camden and R. Water Co., 80 Me. 544; Atlantic City Water Works *v.* Atlantic City, 39 N. J. Eq. 367. But see, *post,* page 570, as to the power of the legislature to provide in such a case for a municipal water works plant.

[1]Logan *v.* Payne, 43 Iowa, 524 (22 Am. Rep. 261).

[2]In re City of Brooklyn, 143 N. Y. 596; In re Long Island Water Supply Co., 143 N. Y. 596; Rockland Water Co. *v.* Camden & R. Water Co., 80 Me. 544; Bartholomew *v.* City of Austin, 85 Fed. 359; 29 C. C. A. 568.

[3]Bailey *v.* City of Philadelphia, 39 A. 494; 41 W. N. C. 529.

[1]Charles River Bridge *v.* Warren River Bridge, 11 Pet. 420; West River Bridge *v.* Dix, 6 How. 507; Lewis *v.* City of Newton, 75 Fed. 884; In re Rochester Water Commissioners, 66 N. Y. 413; Central Bridge Co. *v.* Lowell, 4 Gray, 474; Central City Horse Ry. *v.* Fort Clark, etc., Ry. Co., 87 Ill. 523; Lake Shore, etc., R. R. Co. *v.* Chicago, etc., R. R. Co., 97 Ill. 506; N. C. R. R. Co. *v.* Carolina Central R. R. Co., 83 N. C. 489; In re Towanda, 91 Pa. St. 216. The cases, in support of this rule of the law of eminent domain are numerous; I have only cited a few.

[2]Stein *v.* Bienville Water Supply Co., 34 Fed. 145; *s. c.* 141 U. S. 67; National Water Works *v.* Kansas City, 28 Fed. 921. In the case of Stein *v.* Bienville Water Supply Co., the exclusive franchise was not to supply the city with water generally, but to supply it from a particular creek. And it was held to be no infringement of the exclusive franchise to grant to another corporation the power to use the streets of the city to supply the city with water drawn from another source.

[1]St. Tammany Water Works Co. *v.* New Orleans Water Works Co., 120 U. S. 64.

[2]Long *v.* City of Duluth, 49 Minn. 280.

[1]Parkersburg Gas Co. *v.* Parkersburg, 30 W. Va. 435.

[2]City of Vincennes *v.* Citizens' Gaslight Co., 132 Ind. 114.

[3]Westerly Waterworks Co. *v.* Town of Westerly, 75 Fed. 181; Seamen's Friend Society *v.* City of Westerly, 75 Fed. 181.

[1]Thrift *v.* Elizabeth City, 122 N. C. 31 (water company franchise); Birmingham & P. M. Street Ry. Co. *v.* Birmingham Street Ry. Co., 79 Ala. 465.

[2]Bartholomew *v.* City of Austin, 85 Fed. 359; 29 C. C. A. 568.

[1]Decie *v.* Brown, 167 Mass. 290. See, to the same effect, Plumb *v.* Chrystie, 103 Ga. 686; Deal *v.* Singletary, 105 Ga. 466. This general principle is the one which underlies the law of restrictive licenses. The reader is referred to § 119 for a fuller discussion of the matter.

[1]Commonwealth *v.* Vrooman, 164 Pa. St. 306.

[1]State *v.* Scougal, 3 S. D. 55 (51 N. W. 858).

[2]State ex rel. Goodsill *v.* Woodmause, 1 N. D. 246 (46 N. W. 970).

[3]Guthrie Daily Leader *v.* Cameron, 3 Okl. 677 (41 Pac. Rep. 635).

[1]Commonwealth *v.* Brinton, 132 Pa. St. 62; Commonwealth *v.* Gardner, 133 Pa. St. 284.

[1]Vermont Loan & Trust Co. *v.* Whithed, 2 N. D. 82; Cook *v.* Equitable Bldg. & Loan Assn., 104 Ga. 814; Livingston Loan & Building Assn., 49 Neb. 200; Smoot *v.*

People's Perpetual Loan & Building Assn. (Va.), 29 S. E. 746; Iowa Savings & Loan Assn. *v.* Heidt, 107 Iowa, 297; Zenith Building & Loan Assn. *v.* Heimbach (Minn. '99), 79 N. W. 609. But see Gordon *v.* Winchester Building & Loan Association, 75 Ky. 110.

[2]§ 106.

[3]See, to that effect, Gordon *v.* Building Association, 12 Bush, 110; Simpson *v.* Kentucky Citizens' Bldg. & Loan Assn. (Ky.), 41 S. W. 570.

[1]Opinion of J. Miller in Slaughter-House Cases, 16 Wall. 36. C. J. Chase and JJ. Field, Swayne and Bradley, dissent. In delivering his dissenting opinion, Justice Field said: "By the act of Louisiana, within the three parishes named, a territory exceeding one thousand one hundred square miles, and embracing over two hundred thousand persons, every man who pursues the business of preparing animal food for market must take his animals to the buildings of the favored company and must perform his work in them, and for the use of the buildings must pay a prescribed tribute to the company, and leave with it a valuable portion of each animal slaughtered. Every man in these parishes who has a horse or other animal for sale, must carry him to the yards and stables of the company, and for their use pay a like tribute. He is not allowed to do his work in his own buildings or take his animals to his own stables, or keep them in his own yards, even though they should be erected in the same district as the buildings, stables and yards of the company, and that district embraces over eleven hundred square miles. The prohibitions imposed by this act upon butchers and dealers in cattle in these parishes, and the special privileges conferred upon the favorite corporation, are similar in principle and as odious in character as the restrictions imposed in the last century upon the peasantry in some parts of France, where, as says a French writer, the peasant was prohibited to 'hunt on his own lands, to fish in his own waters, to grind at his own mill, to cook at his own oven, to dry his clothes on his own machines, to whet his instruments at his own grindstone, to make his own wine, his oil and his cider at his own press, * * * or to sell his commodities at the public markets. The exclusive right of all these privileges was vested in the lords of the vicinage. The history of the most execrable tyranny of ancient times,' says the same writer, 'offers nothing like this. This category of oppressions cannot be applied to a free man, or to the peasant, except in violation of his rights.'

"But if the exclusive privileges conferred upon the Louisiana corporation be sustained, it is not perceived why exclusive privileges for the construction and keeping of ovens, machines, grindstones, wine presses, and for all the numerous trades and pursuits for the prosecution of which buildings are required, may not be equally bestowed upon other corporations or private individuals and for periods of indefinite duration. * * * This equality of right, with exemption from all disparaging and partial enactments, in the lawful pursuits of life, throughout the whole country, is the distinguishing privilege of citizens of the United States. To them, everywhere, all pursuits, all professions, all avocations, are open without other restrictions than such as are imposed equally upon all others of the same age, sex, and condition. The State may prescribe such regulations for every pursuit and calling of life as will promote the public health, secure the good order and advance the general prosperity of society, but

when once prescribed, the pursuits or calling must be free to be followed by every citizen who is within the conditions designated, and will conform to the regulations. This is the fundamental idea upon which our institutions rest, and unless adhered to in the legislation of the country our government will be a republic only in name. * * *

"The keeping of a slaughter-house is part of, and incidental to, the trade of a butcher—one of the ordinary occupations of human life. To compel a butcher, or rather all the butchers of a large city and an extensive district, to slaughter their cattle in another person's slaughter-house and pay him a toll therefor, is such a restriction upon the trade, as materially to interfere with its prosecution. It is onerous, unreasonable, arbitrary and unjust. It has none of the qualities of a police regulation. If it were really a police regulation, it would undoubtedly be within the power of the legislature. That portion of the act which requires all slaughter-houses to be located below the city, and to be subjected to inspection, etc., Is clearly a police regulation. That portion which allows no one but the favored company to build, own, or have slaughter-houses is not a police regulation, and has not the faintest semblance of one."

[1]Le Claire *v.* Davenport, 13 Iowa, 210; overruling Davenport *v.* Kelly, 7 Iowa, 109, 110. See the dissenting opinion in the latter case.

[2]New Orleans *v.* Guillotte, 12 La. Ann. 818.

[3]Intoxicating Liquor Cases, 25 Kan. 751 (37 Am. Rep. 284); Koester *v.* State, 36 Kan. 27. See In re Ruth, 32 Iowa, 253; Kohn *v.* Melcher (Iowa), 29 F. 433.

[1]Mayor City of Hudson *v.* Thorne, 7 Paige, 261.

[1]City of Chicago *v.* Rumpff, 45 Ill. 90.

[1]Tiedeman Municipal Corporations, § 144a.

[1]See *also* Tiedeman's Municipal Corporations, § 9.

[2]Mauldin *v.* City Council of Greenville, 33 S. C. 1.

[3]Since the rendition of that decision, cities have been expressly authorized by a provision of the South Carolina constitution to erect and maintain water and electric light works.

[1]In re Rochester Water Works, 66 N. Y. 413; Dayton *v.* Quigley, 29 N. J. Eq. 77; Atlantic City Water Works *v.* Atlantic City, 39 N. J. Eq. 367; Thompson-Houston Electric Co. *v.* Newton, 42 Fed. 723; Hale *v.* Houghton, 8 Mich. 451; City of Crawfordsville *v.* Braden, 130 Ind. 149; Smith *v.* Mayor, etc., City of Nashville, 88 Tenn. 464; State *v.* City of Hiawatha, 53 Kans. 477; Springfield *v.* Fullmer, 7 Utah, 450 (27 Pac. 577); Opinion of Justices, 150 Mass. 592.

[2]88 Tenn. 464.

[3]Opinion of Justices, 150 Mass. 592.

[1]Opinion of Justices, 155 Mass. 598.

[1]State *v.* Brennan's Liquors, 25 Conn. 278. See *post,* current section the discussion of the South Carolina Dispensary law.

[2]§ 125.

[1]110 U. S. 421; the principle is, that the government may exercise any power, which was commonly recognized as a function of government by the civilized nations of the last century, unless it was prohibited by the constitution. See *ante,* § 91, for a full discussion of the case, and *post,* § 215, for a fuller and more accurate statement and discussion of the principle of constitutional construction.

[1]I do not wish to be considered as giving a full and unqualified sanction to these charges.

[2]Pensacola &c. R. R. Co. *v.* West. Union Tel. Co., 96 U. S. 1; State of California *v.* Central Pac. Ry. Co., 127 U. S. 1.

[1]In State *v.* City of Charleston, 10 Rich. L. (S. C.) 491, Mr. Justice O'Neall said: "That the general assembly have all the powers which the corporation (City of Charleston) have exercised in their corporation and for the whole State, I have no doubt. If they (the general assembly), thought proper, they could build a railroad with just as much propriety as a granite State house. Both might lead to an extravagent waste of money, but still the power cannot be questioned. They have dug canals, and built roads, and I have no doubt they will do so again."

[2]McCullough *v.* Brown, 41 S. C. 220.

[1]In the present edition, this clause is qualified so as to read: "There is no doubt that a trade or occupation, which is inherently and necessarily injurious to society, *when it is unrestricted and left open to private enterprise,*" etc.

[1]State ex rel George *v.* Aiken, 42 S. C. 222.

[1]§ 41, art. I, Constitution of S. C.: "The enumeration of rights in this Constitution shall not be construed to impair or to deny others retained by the people, and all powers not herein delegated remain within the people."

[1]This position of the South Carolina court has been recently sustained by a decision in North Carolina in which it was held that State control of the liquor traffic in a county was a lawful monopoly. Guy *v.* Commissioners of Cumberland County, 122 N. C. 471.

[2]§ 125 (§ 103 of the first edition).

[3]Rippe *v.* Becker, 56 Minn. 100.

[4]See *ante,* §§ 96, 97.

[1]§§ 108, 110-113.

[2]§§ 94, 96-106.

[3]§ 111.

[1]See *ante,* § 129.

[1]166 U. S. 290; see *ante,* § 112.